Office-Supreme Court, U.S.
FILED
DEC 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CARLOS CHARDON, ETC., *et al.*, *Petitioners*,

v.

JUAN FUMERO SOTO, *et al.*, *Respondents*.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

JOINT APPENDIX

JAIME R. NADAL ARCELAY,
Counsel of Record
CANCIO, NADAL & RIVERA
G.P.O. Box 4966
San Juan, Puerto Rico 00936
(809) 767-9625
SHELDON H. NAHMOD
77 South Wacker Drive
Chicago, Illinois 60606
(312) 657-5761
Counsel for Respondents

K. MARTIN WORTHY,
Counsel of Record
JOHN G. DEGOOYER
STEPHEN L. HUMPHREY
THEODORE A. HOWARD
HAMEL, PARK, MCCABE & SAUNDERS
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 835-9000
HECTOR REICHARD DE CARDONA
Secretary of Justice
EDUARDO CASTILLO BLANCO
Assistant Secretary
DEPARTMENT OF JUSTICE OF PUERTO RICO
P.O. Box 192
San Juan, Puerto Rico 00902
Counsel for Petitioners

Petition for Writ of Certiorari Filed August 16, 1982
Writ of Certiorari Granted November 8, 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

	Page
Relevant Docket Entries From The United States District Court For The District Of Puerto Rico	1a
Relevant Docket Entries From The United States Court Of Appeals For The First Circuit	5a
Complaint Of Plaintiff Jose Ortiz Rivera, Asserting A Class Action	7a
Transcript Of Minutes Of Proceeding In Chambers Of District Judge Torruella, Denying Plaintiff's Motion For Class Certification	16a
Motion Of Plaintiff Ortiz Rivera For Reconsideration Of Ruling Denying Class Certification	18a
Answer To Complaint Filed By Defendants Chardon And Ramos In *Ortiz Rivera* v. *Chardon*	25a
Motion Of Plaintiff Ortiz Rivera For Leave To File Amended Complaint	29a
Amended Complaint Of Plaintiff Ortiz Rivera	31a
Decision And Order Of District Judge Torruella, Denying Plaintiff's Motion For Leave To File Amended Complaint	49a
Motion Of Plaintiff Ortiz Rivera For Reconsideration Of Ruling Denying Leave To File Amended Complaint	54a
*Complaint Of Plaintiff Juan Fumero Soto	73a
**Answer To Complaint Filed By Defendants Chardon And Ramos In *Fumero Soto* v. *Chardon*	80a
Order And Memorandum Of District Judge Grant, Denying Defendants' Motion For Judgment Notwithstanding The Verdict	84a
Final Order And Judgment Of District Judge Grant ..	108a

---

*A Complaint identical in all relevant respects was filed by each respondent herein. The dates on which these Complaints were filed are provided in the "Relevant Docket Entries" in the District Court.

**An Answer identical in all relevant respects was filed by defendants in each individual case herein.

Table of Contents Continued

Page

Notice Of Appeal To The United States Court Of Appeals For The First Circuit Of Defendants Chardon and Ramos 112a

Judgment Entered By The Clerk Of The District Court In Accordance With The Final Order And Judgment Of District Judge Grant 114a

Notice Of Cross-Appeals To The United States Court Of Appeals For The First Circuit Of Plaintiffs In *Fumero Soto* v. *Chardon* 117a

Consent Judgment Order Of District Judge Grant, Entered *Nunc Pro Tunc* 121a

Opinion, Order, And Judgment Of United States Court Of Appeals For The First Circuit 125a

Order Of The United States Court Of Appeals For The First Circuit 158a

Order Of The United States Court Of Appeals For The First Circuit 159a

Order Of The United States Court Of Appeals For The First Circuit 161a

Order Of The Supreme Court Of The United States, Granting A Writ Of Certiorari 162a

IN THE

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

No. 78-1156

JOSE ORTIZ RIVERA, *Plaintiff*,

v.

CARLOS CHARDON, ETC., *et al.*, *Defendants*.

DOCKET ENTRIES

Document	Date
Complaint, Asserting A Class Action	filed June 19, 1978
Minutes Of Proceeding In Chambers Of District Judge Torruella, Denying Plaintiff's Motion For Class Certification	entered August 21, 1978
Plaintiff's Motion For Reconsideration Of Ruling Denying Class Certification	filed September 11, 1978
Answer To The Complaint	filed September 28, 1978
Plaintiff's Motion For Leave To File Amended Complaint And Attaching Proposed Amended Complaint	filed October 5, 1978
Decision And Order Of District Judge Torruella, Denying Plaintiff's Motion For Leave To File Amended Complaint	entered November 24, 1978
Plaintiff's Motion For Reconsideration Of Ruling Denying Leave To File Amended Complaint	filed November 29, 1978

Document	Date
Complaint Of Carmen Nunez Rivera (79-66)	filed January 10, 1979
Complaint Of Carmen L. Negron Marin (79-70)	filed January 10, 1979
Complaint Of Carmen H. Montes Velez (79-73)	filed January 10, 1979
Complaint Of Carmen Garcia Rosada (79-74)	filed January 10, 1979
Complaint Of Noelia Torres de Cantres (79-76)	filed January 10, 1979
Complaint Of Antonio Rodriguez Rivera (79-83)	filed January 10, 1979
Complaint Of Ramon Norat Zayas (79-219)	filed January 12, 1979
Complaint Of Jose E. Aponte de la Torre (79-164)	filed January 15, 1979
Complaint Of Nilsa Cardona Flores (79-169)	filed January 15, 1979
Complaint Of Elba M. Colon Torres (79-176)	filed January 15, 1979
Complaint Of Aurora Sierra Pizarro (79-183)	filed January 15, 1979
Complaint Of Virginia Otero Arroyo (79-185)	filed January 15, 1979
Complaint Of Ana Mercedes Ortiz Colon (79-197)	filed January 15, 1979
Complaint Of Juan Fumero Soto (79-198)	filed January 15, 1979
Complaint Of Dora Castro de Aguilar (79-199)	filed January 15, 1979
Complaint Of Sylvia M. Denis (79-209)	filed January 15, 1979
Complaint Of Bienvenido Castro del Valle (79-210)	filed January 15, 1979

Document	Date
Complaint Of Elba Rosario de Bravo (79-213)	filed January 15, 1979
Complaint Of Charles H. Quiles Mariana (79-220)	filed January 15, 1979
Complaint Of Reinaldo Rodriguez Solivan (79-206)	filed January 19, 1979
Complaint Of Aida Rodriguez Rioz (79-72)	filed January 24, 1979
Complaint Of Santiago Gonzalez Velasquez (79-323)	filed January 26, 1979
Complaint Of Bienvenido Rivera Diaz (79-325)	filed January 26, 1979
Complaint Of Carmen M. Morales Hernandez (79-326)	filed January 26, 1979
Complaint Of Juan Rivera Pagan (79-329)	filed January 26, 1979
Complaint Of Angela Colon Santiago (79-330)	filed January 26, 1979
Complaint Of Joaquin Cruz Mendez (79-332)	filed January 26, 1979
Complaint Of Ursula Aguilar Quintero (79-333)	filed January 26, 1979
Complaint Of Aminta Rivera Cardona (79-334)	filed January 26, 1979
Complaint Of Nelson Velez Quinones (79-336)	filed January 26, 1979
Complaint Of Cristina Cancel Cuevas (79-357)	filed January 31, 1979
Complaint Of Maria D. Guerra Navarro (79-358)	filed January 31, 1979
Complaint Of Francisco Bonilla Ocasio (79-361)	filed January 31, 1979
Complaint Of Heriberto Gallardo Gutierrez (79-362)	filed January 31, 1979

Document	Date
Complaint Of Julio E. Colon (79-364)	filed January 31, 1979
*Answer To The Complaint In *Fumero Soto* v. *Chardon*	filed March 26, 1979
Order And Memorandum Of District Judge Grant, Denying Defendants' Motion For Judgment Notwithstanding The Verdict	entered May 7, 1981
Final Order And Judgment Of District Judge Grant	entered July 24, 1981
Defendants' Notice Of Appeal To United States Court Of Appeals For The First Circuit	filed July 30, 1981
Judgment Entered By Clerk Of The District Court In Accordance With The Final Order And Judgment Of District Judge Grant	entered July 31, 1981
Plaintiffs' Notice Of Cross-Appeals To The United States Court Of Appeals For The First Circuit	filed August 12, 1981
Consent Judgment Order Of District Judge Grant, Entered *Nunc Pro Tunc* To Final Order And Judgment Of July 24, 1981	entered January 7, 1982

*A similar Answer was filed in each individual case during this approximate time period.

IN THE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Nos. 81-1567, 81-1607

JUAN FUMERO SOTO, *et al.*, *Plaintiffs*,

v.

CARLOS CHARDON, ETC., *et al.*, *Defendants*.

DOCKET ENTRIES

Document	Date
Opinion And Order Of The United States Court Of Appeals For The First Circuit	entered June 8, 1982
Judgment Of The United States Court Of Appeals For The First Circuit	entered June 8, 1982
Order Of The United States Court Of Appeals For The First Circuit, Granting Plaintiffs' Petition For Reconsideration And Modification Of Judgment	entered July 6, 1982
Order Of The United States Court Of Appeals For The First Circuit, Denying Defendants' Petition For Rehearing	entered July 6, 1982

Document	Date
Order Of The United States Court Of Appeals For The First Circuit, Denying Defendants' Petition For Rehearing On Modification Of Judgment And Granting Conditional Stay Of Mandate Pending Application To The Supreme Court Of The United States For A Writ Of Certiorari	entered July 28, 1982

IN THE

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

CIVIL ACTION NO. 78-1156
TRIAL BY JURY

JOSE ORTIZ RIVERA, *Plaintiff*,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of the Commonwealth of Puerto Rico,

Defendants.

COMPLAINT

TO THE HONORABLE COURT:

NOW COMES the Plaintiff and through his undersigned attorneys very respectfully claims, alleges, and requests as follows:

1. This is a class action for declaratory and injunctive relief, back pay, damages, and other relief arising under the First and Fourteenth Amendments to the United States Constitution; Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, as amended, 42 U.S.C. § 1983; 28 U.S.C. § 2201, 2202; 18 L.P.R.A. § 249(e), and 18 L.P.R.A. 214, *et seq.*

2. The jurisdiction of this Court is founded upon 28 U.S.C. § 1331 and 1343(3) and (4). The amount in controversy exceeds $10,000.00, exclusive of interests and costs.

3. The Plaintiff in this action, which is an action pursuant to Rule 23(a) and 23(b) (1) and (2) of the Federal Rules of Civil Procedures, is Jose Ortiz Rivera, who is a resident of Puerto Rico and an employee of the Department of Public Education of the Commonwealth of Puerto Rico (referred to hereinafter as "the Department"). Jose Ortiz Rivera brings this action on behalf of himself and the members of the class described in paragraph 20 of this complaint.

4. The Defendants in this action are:

(a) Carlos Chardon, who is, and at all times herein relevant was, the Secretary of Public Education of Puerto Rico. In this capacity, he has ultimate responsibility for the supervision and administration of the Department, including determination of the employment status of the Plaintiff and those in his class. Defendant Chardon is sued in his individual and official capacities.

(b) Oscar Ramos, who is, and at all times herein relevant was, the Assistant Secretary of Public Education in Charge of Personnel of Puerto Rico. In this capacity, he has responsibility for the supervision and administration of personnel matters in the Department, including the determination of the employment status of the plaintiff and those in his class. Defendant Ramos is sued in his individual and official capacities.

5. On November 2, 1976, Puerto Rico held a gubernatorial election. In this election, the candidate of the Popular Democratic Party (referred to hereinafter as the "PDP") was incumbent Governor Rafael Hernandez Colon. Former Governor Hernandez Colon was defeated by Governor Carlos Romero Barcelo, who was the candidate of the New Progressive Party (referred to hereinafter as the "NPP"). Governor Romero Barcelo took office on January 2, 1977.

6. Governor Romero Barcelo appointed Mr. Herman Sulsona as Secretary of Public Education, and Sulsona, in turn, appointed defendant Ramos as Assistant Secretary of Public Education in Charge of Personnel. Both Sulsona and Defend-

ant Ramos assumed their positions on or about January 3, 1977. Both Sulsona and Defendant Ramos are members and active in the affairs of the NPP.

7. On or about March 13, 1977, Mr. Sulsona resigned as Secretary of Public Education, and Governor Romero Barcelo appointed Defendant Chardon as his successor. Defendant Chardon assumed the position of Secretary of Public Education on or about March 31, 1977. Defendant Chardon is a member and active in the affairs of the NPP.

8. Ortiz Rivera was employed during the 1976-77 school year in a Director position by the Department. To this position he had been promoted on the basis of his merits, from a position in which he did have and enjoy permanent status within the meaning of 18 L.P.R.A. 211 and protected by 18 L.P.R.A. 214, *et seq*. Ortiz Rivera was demoted to his previous position. This last action on the part of Defendants also deprived Ortiz Rivera of his constitutional rights and in particular constituted a violation of his rights under the First and Fourteenth Amendments of the Constitution of the United States. The Director position in which Ortiz Rivera was employed during the 1976-77 school year involved functions of school administration. It was not a policy-making position, and Ortiz Rivera did not participate in the formulation of policies relating to the operation of the Department. He had to follow policies formulated at the Department's level.

9. Ortiz Rivera is, and at all times herein relevant was, a member and active in the affairs of the PDP. On information and belief, the defendants are, and at all times herein relevant were, aware of Ortiz Rivera's political association with the PDP, even if they did not know him personally.

10. On or about June 21, 1977, Ortiz Rivera received a letter, dated June 10, 1977, from Julio Cintron Lopez, Director of the Personnel Division of the Department, removing him from his Director position, effective at the beginning of the 1977-78 school year, and reassigning him to his previous position in the Department. A copy of the aforesaid letter is

attached to this complaint as *Attachment A*, and made a part hereof. Ortiz Rivera's permanent position is a classroom teacher position, which is lower in rank and compensation than a Director position, and, therefore, his reassignment constitutes a demotion. On June 30, 1977 Plaintiff wrote a letter to Defendant Chardon, in which he objects his removal from his position as Director and announces that he is taking the necessary steps towards the corresponding legal action. A copy of such letter is attached to this complaint as *Attachment B*, and made a part hereof.

11. The June 10 letter sets forth no reason for Ortiz Rivera's removal from his Director position, and there was no legitimate reason for such removal. No notice, hearing, nor any other form of due process was awarded in his case.

12. At the beginning of the 1977-78 school year, Ortiz Rivera was actually removed from the Director position in which he was employed during the 1976-77 school year, and demoted to his permanent position in the Department. As of the date of this complaint, he is serving in the latter position.

13. Substantially all of the persons who were employed during the 1976-77 school year without permanent status in locally and/or federally funded positions as Executive Directors, Directors, Assistant Directors, General Supervisors, Zone Supervisors, Superintendents, Assistant Superintendents, and Curriculum Technicians and who were members and/or active in the affairs of the PDP or political parties other than the NPP were removed from their positions at the end of the 1976-77 school year or the beginning of the 1977-78 school year; and substantially all of the persons who were employed during the 1976-77 school year without permanent status in the aforesaid positions and who were not members and/or active in the affairs of the PDP or political parties other than the NPP were not removed.

14. The Director position in which Ortiz Rivera was employed during the 1976-77 school year has been filled for the 1977-78 school year.

15. Ortiz Rivera alleges that the defendants removed him from his Director position at the beginning of the 1977-78 school year and demoted him to his previous position solely because of his political association with the PDP, and that he would not have been removed and demoted but for such association.

16. Ortiz Rivera alleges that the aforesaid action by the Defendants constitutes a violation of his rights under the First and Fourteenth Amendments to the United States Constitution. He also alleges that said action is contrary to and contravenes the rights acquired by him under the provisions of 18 L.P.R.A. 214, *et seq.* He further avers that as a career public servant (empleado publico de carrera) he had the legitimate expectation to remain in the position to which he had been promoted (and from which he was demoted by Defendants) and that he could not be removed or demoted from that position except for cause.

17. The defendants knew, or reasonably should have known, that removing Ortiz Rivera from his Director position and demoting him to his previous position because of his political association with the PDP, was a violation of his rights under the First and Fourteenth Amendments to the United States Constitution. The defendants acted maliciously, willfully, and in wanton and reckless disregard of Ortiz Rivera's constitutional rights when they took the aforesaid action, all in violation of Plaintiff's civil rights as provided in Section 1983, 42 U.S.C.A.

18. The action of the Defendants in removing Ortiz Rivera as stated above constituted a violation of Ortiz Rivera's rights under the First and Fourteenth Amendments to the United States Constitution; constituted a violation of his civil rights as provided in Section 1983, 42 U.S.C.A., and constituted a violation of his rights under the laws of Puerto Rico, specifically (in addition to § 214 mentioned in paragraph 16), under Section 249(a) and (e), of Title 18, L.P.R.A.

Section 249(a) of 18 L.P.R.A. provides as follows:

> "By public school teachers shall be understood, for the purposes of sections 249a-249e of this title, teaching personnel, which includes both the teachers in charge of teaching and special services directly connected with the teaching work, and the officers or employees in technical tasks or in school supervision and administration . . ."

Section 249(e) of 18 L.P.R.A. provides as follows:

> "The school authorities and all other authorities are hereby enjoined from all discrimination or reprisal against a teacher by reason of his affiliation, creed, and political actions; and it is further forbidden that the circumstances mentioned above be taken into consideration in deciding questions such as transfers, work assignments, salary raises, promotions, scholarships, leaves of absence, and any other matters relative to the teacher's professional work or status."

19. Ortiz Rivera invokes the pendent jurisdiction of the Court to hear and decide his claim based upon the above-quoted provisions of Puerto Rico law, and Sections 214, *et seq.* of 18 L.P.R.A.

20. Ortiz Rivera brings this class action on his own behalf and, pursuant to Fed. R. Civ. P. 23(a) (1) and (2), on behalf of all other persons who:

(a) were employed during the 1976-77 school year without permanent status in locally and/or federally funded positions within the Department, pursuant to the definition contained on 249(a) Title 18, L.P.R.A.;

(b) were removed from their positions at the beginning of the 1977-78 school year; and

(c) were members and/or active in the affairs of the PDP or political parties other than the NPP, this being the reason for their removal.

The above-described persons are referred to hereinafter as the Class.

21. The members of the Class reside and work throughout Puerto Rico, and are so numerous, in all probability in excess of one hundred, that it would be impracticable, within the meaning of Fed. R. Civ. P. 23(a) (1), to join all of them in this action.

22. All of the members of the Class, like Ortiz Rivera, were removed from their administrator positions or from the positions enumerated in paragraph 13, solely because of their political association with the PDP or political parties other than the NPP. Accordingly, there are questions of law or fact common to the Class within the meaning of Fed. R. Civ. P. 23(a) (2).

23. Ortiz Rivera's causes of action are based on the claim that the defendants discriminated against him because of his political association with the PDP. This claim is typical of the claims of the members of the Class within the meaning of Fed. R. Civ. P. 23(a) (3).

24. Since Ortiz Rivera's causes of action and the relief which he seeks necessarily would be appropriate for all of the members of the Class, he fairly and adequately will protect the interests of the Class within the meaning of Fed. R. Civ. P. 23(a) (4).

WHEREFORE, the Plaintiff respectfully requests from this Court that it:

1. Declare that the Defendants:

   (a) in removing the Plaintiff and the members of the Class which he represents from the positions in which they were employed during the 1976-77 school year, violated their rights under the First and Fourteenth Amendments to the United States Constitution and under Section 1983 of 42 U.S.C.A.; and also violated their rights under Sections 249(a) and (e) and 214 of Title 18 L.P.R.A.

2. Order that the Defendants:

   (a) reinstate the Plaintiff and the Members of the Class which he represents to the positions in which they

were employed during the 1976-77 school year and from which they were dismissed or demoted in violation of their rights under the statutes mentioned in the complaint.

(b) pay to the Plaintiff and the members of the Class which he represents full back pay for the period from the date of their removal or demotion from the positions in which they were employed during the 1976-77 school year until the date of their reinstatement to those or other substantially equivalent positions, including prejudgment interests, less any pay received, by them from the Department during the period in question.

(c) pay to the Plaintiff and the members of the Class, all damages proximately resulting from defendants' wrongful actions;

(d) pay to the Plaintiff and the members of the Class punitive damages in the amount of $2,500,000.00; and

(e) be enjoined pendente lite and permanently from removing any person from a non-policy making position with the Department because of such person's political association.

3. Award to the Plaintiff and the Class he represents:

(a) costs and reasonable attorneys' fees; and

(b) such other and further relief as this Court shall find to be just and proper.

RESPECTFULLY SUBMITTED. In San Juan, Puerto Rico, this 16th day of June, 1978.

HIRAM R. CANCIO
HARRY R. NADAL ARCELAY
(CANCIO, NADAL & RIVERA)
G.P.O. Box 4966, San Juan, P.R. 00936

LUIS MIRANDA CORREA
Of. 505 - Edif. Asoc. Maestros, Hato Rey, P.R.

LUIS MUNOZ RIVERA
Cond. El Centro I - Of. 607, Hato Rey, P.R.

LUIS E. GANDIA ARGUELLES
Box 20343, Rio Piedras, P.R. 00928

By HIRAM R. CANCIO
HIRAM R. CANCIO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MINUTES OF PROCEEDINGS - DATE: August 21, 1972

BEFORE:

JUDGE
___ Toledo
___ Pesquera
_X_ Torruella
___ Other _____
___ Magistrate Pérez
___ Magistrate Simonpietri

COURT REPORTER
___ Vazquez-Tellas
___ Pineda
_X_ Caro
___ Other _____

COURTROOM DEPUTY
___ V. Maldonado
_X_ L. Rivera
___ Other _____

Interpreter _____

José Ortiz Lucas _____ Civil No. 72-1156

_____ Cr. No. _____

Plaintiff

vs.

Carlos Lamas, Etc et al

Defendant

Attorneys:

For Plaintiff Efrain Cancio
& Harry Nadal

For Defendant Emmanuel Agrait

Case called for hearing on pend motion to modify OSC
& on pltff's request for a stipulation of class action.
Counsel of counsel heard on request for stipulation
of class action. Motion heard. Counsel for pltff
request ext of time to file and to amend complaint
Ct to grant motion to modify OSC, counsel heard
Ct which Ct states that Order will be amended
to the effect that hearing on 9/6/72 will be only
a preliminary inquisition & that thereafter a
hearing will be set for another date on amend
inquisition. Counsel instructed to meet & file stipulation
by Friday

L. Rivera
Courtroom Deputy (Initials)

[Transcript of Minutes of Proceedings]

Case called for hearing on joint motion to modify O.S.C. [Order To Show Cause] & on plaintiff's request for a certification of class action. Argument of counsel heard on request for certification of class action. Motion denied. Counsel for plaintiffs request extension of time to file mot. to amend complaint. As to joint motion to modify O.S.C., argument heard after which Court states that Order will be amended to the effect that hearing on 12/6/78 will be only on preliminary injunction & that thereafter a hearing will be set for another date on permanent injunction. Counsel instructed to meet and file timetable by Friday.

L. Rivera

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 78-1156

JOSE ORTIZ RIVERA, *Plaintiff*,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of The Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of The Commonwealth of Puerto Rico,

Defendants.

MOTION FOR RECONSIDERATION OF RULING

TO THE HONORABLE COURT:

COMES NOW the Plaintiff, and through his undersigned attorney, very respectfully requests from this Court the following:

1. A complaint was filed before this Court on the 16th day of June, 1978, pursuant to Rule 23(a) and 23(b) of the Federal Rules of Civil Procedure as a class action seeking declaratory and injunctive relief, back pay, damages, and other relief arising under the First and Fourteenth Amendments to the United States Constitution; Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, as amended, 42 U.S.C. § 1983; 28 U.S.C. § 2201, 2202; 18 L.P.R.A. § 249(e), and 18 L.P.R.A. 214, *et seq.*

2. That on August 10th, 1978 this Honorable Court entered an Order directing the parties to argue Plaintiff's request for certification of a class action under Rule 23(c) of the Federal Rules of Civil Procedure.

3. That a hearing was held on Monday, August 21, 1978, in which this Court held that the complaint, as filed, did not comply with the requirements of Rule 23 (a)(1) of the Federal Rules of Civil Procedure and that, therefore, this was not a class action.

4. We respectfully urge this Honorable Court to reconsider its ruling and to certify that the complaint at bar is a class action pursuant to the provisions contained in Rule 23 in support of which we submit:

I

Statement of Facts

On June 16th, 1978 the Plaintiff filed an action on behalf of individuals who were employed by the Department of Education of the Commonwealth of Puerto Rico during the 1976-77 school year without permanent status in locally and/or federally funded positions within said Department; and who were removed from said positions at the beginning of the 1977-78 school year and who were members and/or active in the affairs of a political party other than the N.P.P., this being the prime reason for their removal.

The complaint alleges that this is a class action pursuant to Rule 23(a) (1) and (2), since the members of the class are residents and working throughout Puerto Rico; that they are so numerous that it will be impracticable, within the meaning of Federal Rules of Civil Procedure 23(a)(1), to join all of them in this action.

Allegations 22, 23, and 24 of the complaint filed are intended to, and do comply with the requirements of Rule 23(a) (2), 23(a)(3), and 23(a)(4).

This Court, after hearing argument, on August 21, 1978, held that the complaint, as filed, did not comply with the requirement contained in Rule 23(a) (1), and that, therefore, this action could not be certified as a class action pursuant to Rule 23(c).

Rule 23(a) (1)

The beforementioned Rule states, inasmuch as pertinent to the ruling of this Court, that:

> "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) *the class is so numerous that joinder of all members is impracticable.*"

This court held that it had not been established that a joinder of all members of the class represented in the complaint was impracticable. The Court emphasized the fact that although the plaintiffs may will be numerically great, the Court did not find any impracticability in that each of them join in an action discarding the mechanism provided by Rule 23. The Court in its ruling also indicated that joinder was not impracticable due to the fact that all the plaintiffs resided in Puerto Rico and the geographical extension of the Island provided access to each of the plaintiffs and that the determination of whether or not to certify a class action would rest upon this fact.

Rule 23(a) (1) must be liberally construed since the prime reason for the existance of the class suit doctrine is basically procedural necessity, which in turn necessarily hinges upon the question of number; in other words, the question of what constitutes "*impracticability of joinder*" boils down to a determination of when is a class so numerous as to make it impracticable to bring them all before the Court. *Carrole* v. *Associated Musicias of Gratern New York*, 206 F. Supp. 462 (1962); *Cutter* v. *American Federation of Musicians*, 211 F. Supp., 433 (1962). We find that there are a great number of state decisions, as well as federal decisions under Rule 23(a), which somewhat reflect the contrariety of opinion existing as to the meaning of *numerous*. For example, we find that it has been held that numerosity as a requirement under Rule 23 was satisfied when the persons constituting a class were so numerous as to make it impracticable to bring them all before the Court. This holding developed into the present Rule 23(a)(1), which, in dealing with numerosity, defines it in terms of whether or not the joinder of all members of the class is

impracticable because of their number. There is no hard or determined strict Rule regarding number since the concept of numerosity is tied in a definite manner to impracticability of joinder under very specific circumstances.

Although, as we have stated, there is no specific rule which will be applicable to each case before this Court, there are some general tendencies which habe been established and can be utilized in order to descipher the general parameters of the numerosity doctrine and of the requirement contained in Rule 23(a)(1). We find that numbers of individuals under 21 have generally been held to be too few while numbers between 21 and 40 have evoked mixed reactions from different courts. Furthermore, while we admit that there are exceptions to each rule, it seems that numbers in excess of 40, *and particularly those exceeding 100* or 1,000 *have sustained the determination that joinder is impracticable. Gay* v. *Waiters and Dairy Lunchmen's Union* (CA9th, 1977) 549 F2d 1330; *Albertson's, Inc.* v. *Amalgamated Sugar Co.* (D Utah 1973) 62 FRD, 43; *Beckerman* v. *Sands* (SD New York 1973) 364 F Supp 1197; *Henning* v. *United States* (ND III 1974) 385 F Supp 1138; *Larionoff* v. *United States* (D DC 1973) 365 F Supp 140; *Gonzalez* v. *Sheely* (D Ariz 1951) 96 F Supp 1004.

It has also been held that neither the multiplicity of parties, nor the inexperiency, nor the inconvenience of bringing parties before the Court will, in themselves, justify the class action. But these are, however, matters which evidence impracticability. It has been held that under Rule 23(a) (1) the one who asserts the class must show that the circumstances surrounding the case makes the joinder of all the parties impracticable as established in Rule 23(a) (1). The elements which the one who asserts the class should establish concern the sustantive nature of the claim, the type of classsuit, and the relief requested in the complaint, since these elements determine how expansive a definition of the class will be allowed and, therefore, will also determine the numerosity of a class in relation to the impracticability of joinder. It is clear that impracticability of joinder does not mean impossibility, since it is sufficient to

show that it is extremely difficult or inconvenient to join all members of the class. (*Pacific Fire Insurance Company* v. *Reiner*, 45 F. Supp. 703 (1942).

In point to the case before this Court is the holding that Rule 23 of Civil Procedure should be given a liberal rather than a restrictive interpretation. It has consistently been held that:

> "To dismiss a class suit in its incipiency before claimants have been given an effective opportunity to join would be a disservice to the class action as envisioned in the new rule. Indeed, we hold that the new rule should be given a liberal rather than a restrictive interpretation. *Escott* v. *Barchris Construction Corp.*, 340 F.2d 731, 733 (2d Cir. 1965), cert. denied 382 U.S. 816, 86 S.Ct. 37, 15 L.Ed.2d 63 (1966), and that the dismissal *in limine of a particular proceeding as not a proper class action is justified only by a clear showing to that effect and after a proper appraisal of all the factors enumerated on the face of the rule itself.*"

As stated during our original argument in support of class certification, this Court has before it a complaint which pretends to establish common causes of action under various Puerto Rican Statutes, as well as under the Federal Law for a number of "teachers", all of which meet the characteristics established in allegation 20 through 24 of said complaint. The members of the class, as alleged in paragraph 21 of the complaint are numerous. This numerosity being well in excess of 100 individuals. By denying class certification under Rule 23(c), this Court is fostering the filing of over a 100 similar or identical complaints. Thus, it seems it will be achieving exactly what Rule 23 tried to prevent when it is considered essentially a procedural mechanism for the expediency of judicial procedure. The plaintiffs are all teachers, and it would be unduly burdensome for them to institute a complaint for each individual. The effect that this would have on the calendar of the Court is readily apparent. The plaintiffs, as stated before, well exceed the 100 figure and besides the excessive duplication of pleadings, this will greatly affect the expediency within which this common matter can be brought before the Court for final adjudication, since joinder will definitely be impracticable

when one is confronted with this very large number of plaintiffs.

Lastly, let us think for a moment of one aspect of the situation of the case at bar. One of the conditions of the class, as the Court knows, is that its members were demoted allegedly because they did not belong to the New Progressive Party. Even though we do not have a record of the proceedings of the hearing held by this Hon. Court regarding the issue of impracticability of joinder; it seems quite clear to us that the Court feels that it is not impracticable to join those members of the class who are not already our clients. The Hon. Judge's reasoning, as expressed in open Court, seems to be that *all* the members of the class are employees of the same Department of the Government; that there is a Personnel Division or unit where the names of all of them can be located; that such names, addresses, and other pertinent data for us to use in an effort to join them are at our disposal; and that these and other facilities will help us in joining all parties.

This reasoning is logical but, we respectfully submit, it leads the Court to error because it does not contain important aspects necessary; indispensable, rather; for any one to reasonably determine who belongs to the class and who does not. The Personnel Unit of the Department undoubtedly must have the names of all those persons who were employed in the Department, in a supervisory capacity last school year; with an effort, it can provide us with a list of those who, not being permanent, were demoted; but it certainly cannot, from their records or otherwise, give us information to decide which of them were demoted for the reasons alleged in the complaint. Without this last information, it is not only impracticable, but impossible to join all members of the class and, if the Court's ruling were to prevail, those who have not come to us would be greatly prejudiced in their rights.

We respectfully submit to this Honorable Court that it reconsider its ruling of August 21 of 1978 and hold that the complaint as filed is a class action pursuant to Rule 23 and that

it meets the requirements of subsection (a) (1) of numerosity, and, furthermore, that it issue a certification of a class action under Rule 23(c).

In San Juan, Puerto Rico, respectfully submitted, this 7th day of September, 1978.

CANCIO, NADAL & RIVERA
G.P.O. Box 4966
San Juan, Puerto Rico 00936

/s/By HARRY R. NADAL ARCELAY
Harry R. Nadal Arcelay

PROOF OF SERVICE

I hereby certify that on this same date a copy of the foregoing Motion for Reconsideration of Ruling has been sent to: Francisco R. Agrait Llado, Attorney for Defendants, Department of Justice, P.O. Box 192, San Juan, P.R. 00902; Luis Miranda Correa, Esq., Of. 505, Edif. Asociacion de Maestros de P.R., Hato Rey, P.R.; to Luis Munoz Rivera, Esq., Cond. El Centro 1, Of. 607, Hato Rey, P.R. and to Luis E. Gandia Arguelles, Esq., Box 20343, Rio Piedras, P.R. 00928.

/s/ HARRY R. NADAL ARCELAY
Harry R. Nadal Arcelay

RECEIVED & FILED
SEPTEMBER 29 8:45 AM '78
CLERK'S OFFICE
U.S. DISTRICT COURT
SAN JUAN, P.R.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 78-1156

JOSE ORTIZ RIVERA, *Plaintiff*,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of the Commonwealth of Puerto Rico,

Defendants.

ANSWER TO THE COMPLAINT

TO THE HONORABLE COURT:

Appearing through their undersigned attorneys and without submitting to the jurisdiction of this Honorable Court, defendants Carlos Chardon, Secretary of Education of the Commonwealth of Puerto Rico, and Oscar Ramos, Assistant Secretary In Charge of Personnel of the Department of Education of the Commonwealth of Puerto Rico, submit the following answer to the complaint:

GENERAL ALLEGATIONS

1. The Complaint fails to state a claim against these appearing parties upon which any relief may be granted by this Honorable Court.

2. All conclusions of law alleged in the Complaint are disputed insofar as applicable to the factual allegations therein.

3. All factual allegations contained in the Complaint, except those specifically admitted below and as therein qualified, are denied.

4. All allegations referring to plaintiff's alleged Class are generally denied for this Honorable Court denied plaintiff's Class Certification on August 21, 1978.

SPECIFIC ALLEGATIONS

5. Defendants admit paragraphs 4a and b with the clarification that Mr. Ramos' official title is Assistant Secretary of Public Education in Charge of Personnel; 5; 14.

6. Defendants admit the following paragraphs of the Complaint in part, and accept them in part:

Paragraph 3—Defendants admit that Mr. Jose Ortiz Rivera is an employee of the Department of Education of the Commonwealth of Puerto Rico, the rest of the pargraph is denied.

Paragraph 6—The first two sentences are admitted, the last sentence is denied.

Paragraph 7—It is admitted, except for the last sentence which is denied; Mr. Carlos Chardon is but a member of Governor Romero Barcelo's cabinet, the Secretary of Public Education.

Paragraph 8—It is admitted that Mr. Jose Ortiz Rivera was employed during the 1976-77 school year in a Director position, from a permanent position. It is also admitted that he performed the duties inherent to his position as Director. The rest of the allegations contained in this paragraph are denied.

Paragraph 10—It is admitted that Mr. Julio Cintron Lopez sent a letter to Mr. Ortiz Rivera reinstating him to his permanent position as a Social Studies High School Teacher. It is also admitted that on June 30, 1977, Plaintiff wrote a letter to defendant Secretary Chardon, expressing his objection as to the decision announced to him in Mr. Cintron Lopez's letter to him. The rest of the allegations contained in this paragraph are denied.

Paragraph 12—Denied as stated in the Complaint. At the beginning of the school year 1977-78, Mr. Ortiz Rivera was reinstated to his permanent position as a Social Science High School Teacher in the Orocovis School District, a position in which he is presently serving.

7. Paragraph 9 is Denied For Lack of Information and Belief.

8. The following paragraphs are Denied: 1, 2, 11, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state facts upon which any relief can be granted by this Honorable Court.

2. The Complaint fails to state a case or controversy cognizable by this Honorable Court.

3. The Complaint fails to state specific facts adequate to support the jurisdictional grounds alleged therein.

Wherefore these appearing defendants respectfully pray from this Honorable Court, the Complaint herein be dismissed, taking plaintiff with defendants costs, expenses and attorney's fees and such other relief as this Honorable Court may deem just and proper.

Respectfully Submitted.

In San Juan, Puerto Rico, this 28th day of September, 1978.

I hereby certify that copy of this Answer to the Complaint has been sent to Harry R. Nadal Arcelay, Esq., Cancio, Nadal & Rivera, G.P.O. Box 4966, San Juan, Puerto Rico 00936; Luis Miranda Correa, Esq., Of. 505, Asociacion de Maestros Building, Hato Rey, Puerto Rico; Luis Munoz Rivera, Esq., Cond. El Centro 1, Of. 607, Hato Rey, Puerto Rico and to Luis E. Gandia Arguelles, Esq., Box 20343, Rio Piedras, Puerto Rico 00928.

In San Juan, Puerto Rico, this 28th day of September, 1978.

MIGUEL A. GIMENEZ MUNOZ
Secretary of Justice

CARLOS A. SHINE
Deputy Secretary of Justice

/s/ FRANCISCO R. AGRAIT LLADO
Francisco R. Agrait Llado
Attorney
Department of Justice
P.O. Box 192
San Juan, Puerto Rico 00902
Tel. 723-8019

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 78-1156

JOSE ORTIZ RIVERA, *Plaintiff*,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of The Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of The Commonwealth of Puerto Rico,

Defendants.

MOTION UNDER RULE 15 FRCP REQUESTING LEAVE OF COURT TO AMEND COMPLAINT

TO THE HONORABLE COURT:

NOW COMES the Plaintiff and through his undersigned attorneys very respectfully alleges and requests:

1. That a complaint was filed on June 16, 1978, pursuant to Rule 23(a) of the Rules of Civil Procedure, alleging that the Plaintiff, together with more than a hundred (100) other persons who were found in a similar situation as described in paragraph eight (8) of the complaint, comprised a class which meets the requirements of said Rule 23.

2. That this Honorable Court held from the bench on August 21, 1978 that said individuals could not be certified as a class because they did not comply with one of the requirements of Rule 23.

3. That on September 7th, 1978, Plaintiff filed a "Motion for Reconsideration of Ruling", expressing and arguing why the class should be certified as previously prayed for.

4. That on September 28, 1978 this Honorable Court denied the aforesaid Motion, which denial was notified to Plaintiff on October 2, 1978.

5. That on account of the rulings of the Court the best alternative left to the individual members of the class is to have the complaint amended in such a manner that each of them becomes a Co-Plaintiff.

6. That on this date Plaintiffs are submitting an amended complaint, including as Co-Plaintiffs those members of the class who have requested to be represented by the undersigned attorneys in this case.

NOW WHEREFORE, it is respectfully requested from this Honorable Court that it permit Plaintiff to file the attached Amended Complaint and enter the necessary order to that effect.

In San Juan, Puerto Rico, this 2nd. day of October, 1978.

CANCIO, NADAL & RIVERA
G.P.O. Box 4966
San Juan, P.R. 00936

/s/ By HARRY R. NADAL ARCELAY
Harry R. Nadal Arcelay

PROOF OF SERVICE

I hereby certify that on this same date a copy of the foregoing Motion Under Rule 15 FRCP Requesting Leave of Court to Amend Complaint was sent to: Francisco R. Agrait Llado, Attorney for Defendants, Department of Justice, P.O. Box 192, San Juan, P.R. 00902; Luis Miranda Correa, Esq., Of. 505, Edif. Asociacion de Maestros de P.R., Hato Rey, P.R.; to Luis Munoz Rivera, Esq., Cond. El Centro 1, Of. 607, Hato Rey, P.R., and to Luis E. Gandia Arguelles, Esq., Box 20343, Rio Piedras, P.R. 00928.

/s/ HARRY R. NADAL ARCELAY
Harry R. Nadal Arcelay

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

CIVIL ACTION 78-1156

TRIAL BY JURY

ANGEL L. ARZON MENDEZ, CARLOS CRUZ BELTRAN, AIDA A. LOPEZ DE FERRA, LYDIA MUNOZ MORALES, CHARLES H. QUILES MARIANI, MIGUEL A. ALVELO RODRIGUEZ, CRISTINA CANCEL CUEVAS, MARIA D. GUERRA NAVARRO, KREMLLY RODRIGUEZ VALENTIN, URSULA AGUILAR QUINTERO, YOLANDA ANGUITA DE RIOS, VIRGINIA ARROYO OTERO, CARMEN ZORAIDA ARROYO QUILES, BLANCA CACHO COLLAZO, BIENVENIDO CASTRO DEL VALLE, RAMON DE JESUS SIERRA, SYLVIA M. DENIS, ENRIQUE DIAZ MALDONADO, GLORIA ECHEVARRIA DE BURGOS, JUAN FUMERO SOTO, VICTOR MARTINEZ TORRES, JOSE R. MUNOZ RIVERA, CARMEN ORTIZ LEMOIS, MARIA V. PAGAN SEDA, RAMON A. PEREZ RAMIREZ, JORGE O. PRINCIPE GALARZA, AMINTA RIVERA CARDONA, AIDA RODRIGUEZ RIOS, GASPAR RODRIGUEZ RODRIGUEZ, SYRAIDA ROSA CARDONA, JOSE A. SURILLO RODRIGUEZ, SARA VELAZQUEZ CONCEPTION, LESLY F. LOPEZ MIRANDA, CARMEN I. LUGO SOTERO, JOSE D. NIEVES RIVERA, ANTONIO VEGA ORTIZ, SAQUIA AZIZE MAWAD, IRMA I. BALDONI DE VALENCIA, FANNY CACHO DE FREYTES, JULIA MARTINEZ VDA. CALDERON, CARMEN M. MORALES HERNANDEZ, ANA MERCEDES ORTIZ COLON, EVELYN PINGHETTI DELGADO DE PINERO, CARMEN ROMAN DE MOLINA, ENRIQUE ROSADO ALVERIO, LLBA ROSARIO DE BRAVO, NOELIA TORRES DE CANTRES, IRIS CAMELIA VELEZ MORALES, CARMEN GARCIA ROSADO, PAHITA GUADALUPE GARCIA, FRANCISCO BONILLA OCASIO, HERIBERTO GALLARDO GUTIERREZ, JOSE MELENDEZ PINERO, ANGEL LUIS ALLENDE VELAZQUEZ, JOSE A. ALVARADO, CECILIO ALVAREZ PLAJAS, CLAUDIO AVILES NAVARRO, JOSE E. APONTE DE LA TORRE, HILDA BENITEZ CONCEPTION, ANTONIA BETANCOURT ESPINOSA, NILSA CARDONA FLORES, DORA CASTRO DE AGUILAR, MARIA E. CASTRO GIBOYEAUSE, WILFREDO CINTRON SANTANA, JULIO E. COLON, ANGELA L. COLON SANTIAGO, ELBA M. COLON TORRES, BENJAMIN CORDERO QUINONES, ALVARO CRESPO MENDEZ, ROBERTO CRUZ CRUZ, JOAQUIN CRUZ MENDEZ, ZORAIDA CRUZ RIVERA, EDDA L. DE AYALA LAFUENTE, BLANCA GONZALEZ MARIN, SANTIAGO GONZALEZ VELAZQUEZ, ANDRES A. HERNANDEZ ORTIZ, EVELYN IRIZARRY ESCOBAR, TERESA LEON ROSADO, JOSEFA MARRERO AYALA, ANGEL LUIS MARRERO GONZALEZ, CARMEN H. MONTES VELEZ, FIDELINA MORALES CASANOVA, CARMEN L. NEGRON MARIN, RAMON NORAT ZAYAS, CARMEN NUNEZ RIVERA, HERMINTA A. ORTIZ ORTIZ, JOSE ORTIZ RIVERA, CARMEN D. PEREZ ROMAN, ANGEL S. PEREZ TOLEDO, BIENVENIDO RIVERA DIAZ, RAFAEL RIVERA FERNANDEZ, JUAN RIVERA PAGAN, PAULITA RODRIGUEZ CRESPO, ANTONIO RODRIGUEZ RIVERA, REINALDO RODRIGUEZ SOLIVAN, NEMUEL ROSAS LEBRON, JOSE MANUEL ROSADO SANCHEZ, GLADYS ROSARIO ACEVEDO, AIDA L. SANCHEZ DE NEGRON, IRAIDA SANCHEZ MARQUEZ, AIDA E. SANTIAGO DE ORTA, LAURA L. SANTOS ROA, AURORA SIERRA PIZARRO, EFRAIN TACORONTO ORTIZ, EDUARDO TARAFA GONZALEZ, ISAIAS TORRES SANCHEZ, JOSE A. TORRES PEREZ, RAMON A. VEGA CRUZ, ROBERTO VELAZQUEZ NIEVES, NELSON VELEZ QUINONES, WILLIAM VILLOCK TOUSET, JOSE MARRERO LUNA, FELIPE ODIOTT MORALES, AGUSTIN LAO COLON, MIGUEL AYALA CINTRON, JACOBO CARRASQUILLO OLMEDO, ANGEL COLLAZO SIERRA, MANUEL FIGUEROA RODRIGUEZ, CARMEN M. LLaBRES GUEVARA,

PEDRO I. RIVERA CORREA, and ENIC M. ALVAREZ SOTO,
Plaintiffs,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of the Commonwealth of Puerto Rico,

Defendants.

AMENDED COMPLAINT

TO THE HONORABLE COURT:

NOW COME the Plaintiffs and through their undersigned attorneys very respectfully claim, allege, and request as follows:

1. This is an action for declaratory and injunctive relief, back pay, damages, and other relief arising under the First and Fourteenth Amendments to the United States Constitution; Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, as amended, 42 U.S.C. §1983; 28 U.S.C. § 2201, 2202; 18 L.P.R.A. §249(e), 18 L.P.R.A. 211, and 18 L.P.R.A. 214, *et seq*.

2. The jurisdiction of this Court is founded upon 28 U.S.C. §1331 and 1343 (3) and (4). The amount in controversy exceeds $10,000.00, exclusive of interests and costs.

3. The Plaintiffs in this action are residents of Puerto Rico and employees of the Department of Public Education of the Commonwealth of Puerto Rico (referred to hereinafter as "the Department").

4. The Defendants in this action are:

(a) Carlos Chardon, who is, and at all times herein relevant was, the Secretary of Public Education of Puerto Rico. In this capacity, he has ultimate responsibility for the supervision and administration of the Department, including determination of the employment status of the Plaintiffs and those in their class. Defendant Chardon is sued in his individual and official capacities.

(b) Oscar Ramos, who is, and at all times herein relevant was, the Assistant Secretary of Public Education in Charge of Personnel of Puerto Rico. In this capacity, he has responsibility for the supervision and administration of personnel matters in the Department, including the determination of the employment status of the Plaintiffs and those in their class. Defendant Ramos is sued in his individual and official capacities.

5. On November 2, 1976, Puerto Rico held a gubernatorial election. In this election, the candidate of the Popular Democratic Party (referred to hereinafter as the "PDP") was incumbent Governor Rafael Hernandez Colon. Former Governor Hernandez Colon was defeated by Governor Carlos Romero Barcelo, who was the candidate of the New Progressive Party (referred to hereinafter as the "NPP"). Governor Romero Barcelo took office on January 2, 1977.

6. Governor Romero Barcelo appointed Mr. Herman Sulsona as Secretary of Public Education, and Sulsona, in turn, appointed defendant Ramos as Assistant Secretary of Public Education in Charge of Personnel. Both Sulsona and Defendant Ramos assumed their positions on or about January 3, 1977. Both Sulsona and Defendant Ramos are members and active in the affairs of the NPP.

7. On or about March 13, 1977, Mr. Sulsona resigned as Secretary of Public Education, and Governor Romero Barcelo appointed Defendant Chardon as his successor. Defendant Chardon assumed the position of Secretary of Public Education on or about March 31, 1977. Defendant Chardon is a member and active in the affairs of the NPP.

8. All the Plaintiffs mentioned in the caption of this complaint were employed by the Department of Education during the 1976-77 school year, without permanent status; in locally and/or federally funded positions as Executive Directors, Directors, Assistant Directors, General Supervisors, Zone Supervisors, Superintendents, Assistant Superintendents, and Curriculum Technicians, in the manner more specifically detailed in the last paragraph of this complaint, the one immediately preceding the prayer. They had been promoted to their respective positions, on the basis of their merits, from lower positions in which each of them did have and enjoy permanent status within the meaning of 18 L.P.R.A. 211 and was protected by 18 L.P.R.A. 214, *et seq.* Each Plaintiff was demoted to his previous position, such demotion to take effect at the beginning of the 1977-78 school year. This last action on the part of Defendants also deprived Plaintiffs of their constitutional rights and, in particular, constituted a violation of their rights under the First and Fourteenth Amendments of the Constitution of the United States. The aforementioned positions in which Plaintiffs were employed during the 1976-77 school year involved functions of school administration. They were not policy-making positions, and no Plaintiff did participate in the formulation of policies relating to the operation of the Department. They had to follow polices formulated at the Department's level.

9. All Plaintiffs are, and at all times herein relevant were, members and active in the affairs of the PDP or political parties other than the NPP. On information and belief, the defendants are, and at all times herein relevant were, aware of Plaintiffs' political association with their respective parties, even if they did not know them personally.

10. On or about June, 1977, each Plaintiff received a letter, signed by Julio Cintron Lopez, Director of the Personnel Division of the Department, removing him from his position, effective at the beginning of the 1977-78 school year, and reassigning him to his previous position in the Department. A copy of each of the aforesaid letters is attached to this complaint as

Attachment A, and made a part hereof. Each Plaintiff's permanent position, to which he was assigned as per the corresponding letter (of the ones mentioned above), is lower in rank and compensation than the non permanent he held until then, and, therefore, his reassignment constitutes a demotion. On or about June, 1977, each Plaintiff wrote a letter to Defendant Chardon, in which he objects his removal from his position and announces that he is taking the necessary steps towards the corresponding legal action. A copy of each one of such letters is attached to this complaint as *Attachment B*, and made a part hereof.

11. The letter received by each Plaintiff sets forth no reason for his removal from his non permanent position he held and there was no legitimate reason for any one of such removals. No notice, hearing, nor any other form of due process was awarded in any case.

12. At the beginning of the 1977-78 school year, each Plaintiff was actually removed from the non permanent position in which he was employed during the 1976-77 school year, and demoted to his permanent position in the Department. As of the date of this complaint, he is serving in the latter position.

13. Substantially all of the persons who were employed during the 1976-77 school year without permanent status in locally and/or federally funded positions as Executive Directors, Directors, Assistant Directors, General Supervisors, Zone Supervisors, Superintendents, Assistant Superintendents, and Curriculum Technicians and who were members and/or active in the affairs of the PDP or political parties other than the NPP were removed from their positions at the end of the 1976-77 school year or the beginning of the 1977-78 school year; and substantially all of the persons who were employed during the 1976-77 school year without permanent status in the aforesaid positions and who were not members and/or active in the affairs of the PDP or political parties other than the NPP were not removed.

14. All the supervisory positions in which Plaintiffs were employed during the 1976-77 school year have been filled for the 1977-78 school year.

15. Plaintiffs allege that the Defendants removed them from their respective supervisory positions at the beginning of the 1977-78 school year and demoted them to their respective previous positions solely because of their political association with the PDP or parties other than the NPP, and that they would not have been removed and demoted but for such association.

16. Plaintiffs allege that the aforesaid actions by the Defendants constitute a violation of their rights under the First and Fourteenth Amendments to the United States Constitution. They also allege that said actions are contrary to and contravene the rights acquired by them under the provisions of 18 L.P.R.A. 214, *et seq*. They further aver that as career public servants (empleados publicos de carrera) they had the legitimate expectation to remain in their respective positions to which they had been promoted (and from which they were demoted by Defendants) and that they could not be removed or demoted from those positions except for cause.

17. The Defendants knew, or reasonably should have known, that removing Plaintiffs from their respective supervisory positions and demoting them to their previous position because of their political association with the PDP or parties other than the NPP was a violation of their rights under the First and Fourteenth Amendments to the United States Constitution. The Defendants acted maliciously, willfully, and in wanton and reckless disregard of Plaintiffs' constitutional rights when they took the aforesaid actions, all in violation of Plaintiffs' civil rights, as provided in Section 1983, 42 U.S.C.A.

18. The action of the Defendants in removing Plaintiffs as stated above constituted a violation of their rights under the First and Fourteenth Amendments to the United States Constitution; constituted a violation of their civil rights as provided in Section 1983, 42 U.S.C.A., and constituted a violation of

their rights under the laws of Puerto Rico, specifically (in addition to §214 mentioned in paragraph 16), under Section 249(a) and (e), of Title 18, L.P.R.A.

Section 249 (a) of 18 L.P.R.A. provides as follows:

> "By public school teachers shall be understood, for the purposes of sections 249 a-249e of this title, teaching personnel, which includes both the teachers in charge of teaching and special services directly connected with the teaching work, and the officers or employees in technical takss or in school supervision and administration . . . ."

Section 249 (e) of 18 L.P.R.A. provides as follows:

> "The school authorities and all other authorities are hereby enjoined from all discrimination or reprisal against a teacher by reason of his affiliation, creed, and political actions; and it is further forbidden that the circumstances mentioned above be taken into consideration in deciding questions such as transfers, work assignments, salary raises, promotions, scholarships, leaves of absence, any other matters relative to the teacher's professional work or status."

19. Plaintiffs invoke the pendent jurisdiction of the Court to hear and decide their claim based upon the above-quoted provisions of Puerto Rico law, and Sections 214, *et, seq.* of 18 L.P.R.A.

20. The plaintiff's in this action are enumerated as follows in this allegation together with a description of the position from which they were demoted and the position to which they were demoted.

Name	Position from which demoted	Position to which demoted
Arzon Mendez, Angel L.	Supt. II, Ceiba	Supt. III, Loiza
Cruz Beltran, Carlos	Supt. III, Loiza	Director Secondary School, Patillas
Lopez de Ferra, Aida A.	Supt. III, Ciales	Asst. Supt. III, Ciales

Name	Position from which demoted	Position to which demoted
Munoz Morales, Lydia	Supt. III Aguas Buenas	General Supervisor II, Caguas
Quiles Mariani, Charles H.	Supt. V., Ponce - West	General Supervisor V, Ponce
Alvelo Rodriguez, Miguel A.	Asst. Supt. III, Aguas Buenas	Director, Sec. School III, Barranquitas
Cancel Cuevas, Cristina	Asst. Supt. II, Jayuya	Director, Elem. School III, Jayuya
Guerra Navarro, Maria D.	Asst. Supt., Loiza	
Rodriguez Valentin, Kremlly	Asst. Supt. III, Ciales	Director, Elem. School III, Ciales
Aguilar Quintero, Ursula	General Superv. III - Spanish Arecibo	Secondary School Teacher, Vega Alta
Anguita de Rios, Yolanda	General Supt. III - Dept. Home Ec.	Home Ec. Teacher, Villalba
Arroyo Otero, Virginia	General Superv. V - Dept. Title VI - D, PL 93-380	Director Elem. School IV, Catano
Arroyo Quiles, Carmen Zoraida	Zone Superv. English	Secondary School Teacher - English, Hatillo
Cacho Collazo, Blanca	General Superv. III - Dept. Fed. Program	Director - Elem. School II, Rio Piedras "C"
Castro del Valle, Bienvenido	General Superv. IV Dept. Ed. and Working Centers	Zone Health Supervisor, San Juan
De Jesus Sierra, Ramon	Zone Supervisor - English, Adjuntas	Secondary School Teacher - English, Lares
Denis, Sylvia M.	General Superv. I Music Program Dept.	Music Teacher, Rio Piedras - D

Name	Position from which demoted	Position to which demoted
Diaz Maldonado, Enrique	General Superv. V Title I - Depart. III	Asst. Superv. III, Aguas Buenas
Echevarria de Burgos, Gloria	General Superv. Home Ec., San Juan	Home Ec. Teacher, Rio Piedras "C"
Fumero Soto, Juan	General Superv. I - School and Comm. Relations Program	English Teacher, Arecibo
Martinez Torres, Victor	General Superv. School and Comm. Relations Program	
Munoz Rivera, Jose R.	General Superv. IV. Dept.	General Superv. III - San Juan
Ortiz Lemois, Carmen	General Superv. V.	General Superv. I, Evaluation Program Dept.
Pagan Seda, Maria V.	Zone Superv. English, Cabo Rojo	Elementary English Teacher, Cabo Rojo
Perez Ramirez, Ramon A.	General Superv. VI - Dept.	Asst. Supt. IV, Utuado
Principe Galarza, Jorge O.	General Superv. II - English, Humacao	Zone Superv. III, Juncos
Rivera Cardona, Aminta	General Superv. IV, Job Corps Program	Vocational Counselor
Rodriguez Rios, Aida	General Superv., Humacao	Director III Elementary School, Guaynabo
Rodriguez Rodriguez, Gaspar	General Superv. Adult Ed. Program, Caguas	Secondary Teacher English, Cidra

Name	Position from which demoted	Position to which demoted
Rosa Cardona, Syraida	General Superv. III	Secondary School Teacher, Rio Piedras "C"
Surillo Rodriguez, Jose A.	General Superv. I Coop Ed. Program, Humacao	Director III Elementary School, Yabucua
Velazquez Concepcion, Sara	General Superv. Comm. Ed. Program	Comm. Ed. Teacher, San Juan
Lopez Miranda, Lesly F.	Health Superv. III (Zone), Naguabo	
Lugo Sotero, Carmen I	Health Superv., Guayanilla	Secondary School Teacher, Guayanilla
Nieves Rivera, Jose D.	Health Superv. Zone, Naranjito	High School Teacher, Naranjito
Vega Ortiz, Antonio	Health Superv. III (Zone), Barranquitas	High School Teacher, Barranquitas
Azize Mawad, Saquia	Executive Director II (Home Econ.) P.E.D., Hato Rey	General Superv. (Home Econ.)
Baldoni de Valencia, Irma I.	General Superv. IV. P.E.D. Hato Rey	English Superv. Zone III, Rio Piedras "B"
Cacho de Freytes, Fanny	Executive Director II (Title I Evaluation Program)	General Superv. V. (English) P.E.D., Hato Rey
Martinez Vda. Calderon, Julia	Vice-Director (Home Economics), Central Office	Home Economics Teacher
Morales Hernandez, Carmen M.	Executive Director I, Central Office	General Superv. III - Adult Ed. Program - Central Office

Name	Position from which demoted	Position to which demoted
Ortiz Colon, Ana Mercedes	Asst. Director (Special Voc. Program) P.E.D., Hato Rey	Vocational Counselor, Rio Piedras "A"
Pinghetti Delgado de Pinero, Evelyn	Executive Director Ed. Serv. Center & Public Library Ponce	Elementary School Director II - Ponce-West
Roman de Molina, Carmen	Asst. Director (Vocational Program) P.E.D., Hato Rey	Home Econ. Teacher Rio Piedras "A"
Rosado Alverio, Enrique	Executive Director (Ed. Serv. Center) P.E.D., Hato Rey	High School, Director V, Bayamon-South
Rosario de Bravo, Elba	Director Executive II - P.E.D., Hato Rey	General Superv. V - P.E.D., Hato Rey
Torres de Cantres, Noelia	Asst. Director (Business Ed. Program) P.E.D., Hato Rey	Business Education Teacher, Rio Piedras "B"
Velez Morales, Iris Camelia	Executive Director II - External Aids Program	General Superv. III - P.E.D., Hato Rey
Garcia Rosado, Carmen	Curriculum Teacher (Career Ed Proyect) Bayamon - South	Secondary School Teacher, Rio Piedras "C"
Guadalupe Garcia, Pahita	Curriculum Teacher III - P.E.D., Hato Rey	Secondary School Teacher, Gurabo
Bonilla Ocasio, Francisco	Relation Coordinator, Las Marias	

Name	Position from which demoted	Position to which demoted
Gallardo Gutierrez, Heriberto	Coordinator (School Community Relation), Guayanilla	School Teacher
Melendez Pinero, Jose	Coordinator, Naguabo	Elementary School Teacher
Allende Velazquez, Angel Luis	Elementary School Director III	Elementary School-Teacher
Alvarado, Jose A.	Vocational School Director II	English Secondary School Teacher
Alvarez Plajas, Cecilio	Vocational School Assistant Director II	Offices and Industries School Teacher
Aviles Navarro, Claudio	Second Unit Director IV	Secondary School Teacher
Aponte de la Torre, Jose E.	Vocational School Director III	Industrial Arts School Teacher
Benitez Concepcion, Hilda	Elementary School Director II	Elementary School Teacher
Betancourt Espinosa, Antonia		Elementary School Director III
Cardona Flores, Nilsa	Second Unit Director	Secondary School Teacher
Castro de Aguilar, Dora	Secondary School Assistant Director III	Secondary Social Science School Teacher
Castro Giboyeause, Maria E.	Secondary School Assistant Director IV	Second Unit School - Director III
Cintron Santana, Wilfredo	Work and Education Center - Director IV, Secondary Level	

Name	Position from which demoted	Position to which demoted
Colon, Julio E.	Work and Education Center Director	
Colon Santiago, Angela L.	Secondary School Director V	Secondary School Director IV
Colon Torres, Elba M.	Elementary School Director III	Elementary School Teacher
Cordero Quinones, Benjamin	Intermediate School Director III	Secondary School Director II
Crespo Mendez, Alvaro	Secondary School Assistant Director	Secondary School Teacher
Cruz Cruz, Roberto	Work and Education Center Director	Industrial Arts Teacher
Cruz Mendez, Joaquin	Elementary School Director II	Elementary School Teacher
Cruz Rivera, Zoraida	Secondary School Director III	Secondary School Teacher
De Ayala Lafuente, Edda I.	Intermediate School Director IV	Secondary School Director III
Gonzalez Marin, Blanca	Secondary School Director IV	Elementary School Director II
Gonzalez Velazquez, Santiago	Intermediate School Director III	Secondary School Director II
Hernandez Ortiz, Andres A.	Work and Education Center Director	Elementary School Teacher
Irizarry Escobar, Evelyn	Secondary School Director III	Secondary English Teacher
Leon Rosado, Teresa	Secondary School Director III	Home Economics School Teacher
Marrero Ayala, Josefa	Second Unit School Director III	Library Teacher

Name	Position from which demoted	Position to which demoted
Marrero Gonzalez, Angel Luis	Second Unit School Director III	Elementary School Teacher
Montes Velez, Carmen H.	Elementary School Director IV	Elementary School Director II
Morales Casanova, Fidelina	Secondary School Director	Zone - English Supervisor III
Negron Marin, Carmen L.	Secondary School Assistant Director III	Secondary School Teacher
Norat Zayas, Ramon	Elementary School Director II	Secondary School Teacher
Nunez Rivera, Carmen	Secondary School Director III	Secondary School Teacher
Ortiz Ortiz, Herminia A.	Secondary School Director III	Secondary School Teacher
Ortiz Rivera, Jose	Secondary School Director IV	Secondary School Teacher
Perez Roman, Carmen D.	General Supervisor III	
Perez Toledo, Angel S.	Elementary School Director III	Elementary School Teacher
Rivera Diaz, Bienvenido	Second Unit Director III	Elementary School - Director II
Rivera Fernandez, Rafael	Intermediate School Director IV	Elementary School Director II
Rivera Pagan, Juan	Director Work and Education Center	
Rodriguez Crespo, Paulita	Elementary School Director II	Elementary School Teacher
Rodriguez Rivera, Antonio	Sub-Director Work and Education Center	Elementary School Teacher

Name	Position from which demoted	Position to which demoted
Rodriguez Solivan, Reinaldo	Technological Institute Director	Technical Related Subjects Teacher
Rosas Lebron, Nemuel	Director Work and Education Director II	
Rosado Sanchez, Jose Manuel	Sub-Director Work and Education Center	General Supervisor III, Adult Basic Education
Rosario Acevedo, Gladys	Second Unit Director III	Elementary School Teacher
Sanchez de Negron, Aida L.	Elementary School Director	
Sanchez Marquez, Iraida	Second Unit School Director V	Elementary School Director II
Santiago de Orta, Aida E.	Elementary School Director III	Secondary School Teacher
Santos Roa, Laura L.	Elementary School Director II	Elementary School Teacher
Sierra Pizarro, Aurora	Elementary School Director III	Elementary School Director II
Tacoronte Ortiz, Efrain	Elementary School Director II	Library School Teacher
Tarafa Gonzalez, Eduardo	Second Unit School Director	Elementary School Director III
Torres Sanchez, Isaias	Elementary School Director	Secondary School Teacher
Torres Perez, Jose A.	Secondary School Director III	Vocational Counselor
Vega Cruz, Ramon A.	Vocational Director III	
Velazquez Nieves, Roberto	Elementary School Director III	Secondary School Teacher
Velez Quinones, Nelson	Secondary School Director IV	Secondary School Director III

Name	Position from which demoted	Position to which demoted
Villock Touset, William	Elementary School Director III	Elementary School Director III
Marrero Luna, Jose	Work and Ed. Center Director	Vocational Adviser
Odiott Morales, Felipe	Director Night School	Director Secondary Unit
Lao Colon, Agustin	General Superv. School Comm.	General Superv. Coop. Ed. Program
Ayala Cintron, Miguel	Special Teacher Spanish High School	Intermediate School Teacher
Carrasquillo Olmedo, Jacobo	Vocational High School Teacher	Work and Education Center
Collazo Sierra, Angel	Physical Ed. Teacher, Work and Education Center	Physical Education Teacher
Figueroa, Rodriguez, Manuel	High School Teacher, Cabinet Making	Offices and Industries, Intermediate School Teacher
Llabres Guevara, Carmen M.	Elementary English and Science Teacher	Secondary School Teacher
Rivera Correa, Pedro I.	Physical Ed. Teacher, Work and Education Center	
Alvarez Soto, Enic M.	Vocational Superior School Teacher	Elementary School Teacher

WHEREFORE, the Plaintiffs respectfully request from this Court that it:

1. Declare that the Defendants:

(a) in removing the Plaintiffs from the positions in which they were employed during the 1976-77 school year, violated their rights under the First and Fourteenth

Amendments to the United States Constitution and under Section 1983 of 42 U.S.C.A.; and also violated their rights under Sections 249(a) and (e) and 214, *et seq.* of Title 18 L.P.R.A.

2. Order that Defendants:

(a) reinstate all Plaintiffs to the position in which each of them was employed during the 1976-77 school year and from which he was dismissed or demoted in violation of their rights under the statutes mentioned in the complaint.

(b) pay to each Plaintiff full back pay for the period from the date of his removal or demotion from the positions in which he was employed during the 1976-77 school year until the date of his reinstatement to that or other substantially equivalent position, including prejudgment interests, less any pay received by him from the Department during the period in question.

(c) pay to the Plaintiffs all damages proximately resulting from defendants' wrongful actions;

(d) pay to the Plaintiffs punitive damages in the amount of $2,500,000.00; and

(e) be enjoined permanently from removing any person from a non-policy making position with the Department because of such person's political association.

3. Award to the Plaintiffs:

(a) costs and reasonable attorneys' fees; and

(b) such other and further relief as this Court shall find to be just and proper.

RESPECTFULLY SUBMITTED. In San Juan, Puerto Rico, this 5th. day of October, 1978.

HIRAM R. CANCIO
HARRY R. NADAL ARCELAY
CANCIO, NADAL & RIVERA
G.P.O. Box 4966
San Juan, Puerto Rico 00936

LUIS MIRANDA CORREA
Of. 505 — Edif. Asoc. de Maestros de PR
Hato Rey, Puerto Rico

LUIS MUNOZ RIVERA
Condominio El Centro I
Oficina 607, Hato Rey, P.R.

LUIS E. GANDIA ARGUELLES
Box 20343
Rio Piedras, Puerto Rico 00928

/s/ By Hiram R. Cancio

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

CIVIL NUMBER: 78-1156

JOSE ORTIZ RIVERA, *Plaintiff*,

v.

CARLOS CHARDON, *et al.*, *Defendants*.

DECISION AND ORDER

Plaintiff, Ortiz Rivera, is presently a high school teacher in Orocovis, Puerto Rico. In this position he has tenure within the Department of Education. During the 1976-77 school year he was promoted to the position of Director of Schools in Orocovis. At the commencement of the 1977-1978 school year he was notified that he was being reinstated in his previous teacher position. Plaintiff avers that this demotion was due entirely to his political beliefs. Defendants retort that this demotion was requested voluntarily by Plaintiff and, irrespectively, that the appointment as Director was soley for a one year term. This matter is now before us on Defendants' Motion for Summary Judgment.

Summary Judgment pursuant to Rule 56, Fed. R. Civ. P. is proper "if the pleadings depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law." This is a high standard. *Thyssen Plastik Anger Kg.* v. *Induplas, Inc.*, 576 F.2d 400 (C.A. 1, 1978).

> "In determining whether summary judgment is appropriate the court must 'look at the record . . .in the light most favorable to . . . the party opposing the motion . . .'

> Similarly the court must indulge all inferences favorable to the party opposing the motion . . .
>
> "The language of Rule 56(c) sets forth a bifurcated standard which the party opposing summary judgment must meet to defeat the motion. He must establish the existence of an issue of fact which is both 'genuine' and 'material.' A material issue is one which affects the outcome of the litigation. To be considered 'genuine' for Rule 56 purposes a material issue must be established by 'sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial.' The evidence manifesting the dispute must be 'substantial', going beyond the allegations of the complaint." *Hahn* v. *Sargent*, 523 F.2d 461, 464 (C.A. 1, 1975). (Citations omitted).

The factual materials before us reveal the following: By letter of the former Secretary of Education, August 17, 1976, Plaintiff was named a Director in the Island's educational system. Said letter reads:

> "It is my pleasure to inform you that I have reassigned you to position number 0100, Secondary Director IV in the Orocovis School District. This promotion reassignment will be effective immediately and have substitute character with a monthly salary of $915.00.
>
> "Your contract will be subject to renewal upon termination of each school year according to the recommendation of your immediate supervisor and the necessities of the service. You will be considered for probationary or permanent assignment to the position I am now assigning you in accordance with established norms." (translation ours).

Plaintiff remained in this position during the school year 1976-1977. In May, 1977 Plaintiff informed the Superintendent of Schools both verbally and in written form the following:

> "I am pleased to inform you that I have decided to return to the position of Social Studies teacher in which I have tenure in high school, at the commencement of the 1977-1978 school year. To this effect I am requesting use of regular accumulated vacation which on May 31, are 43 days. This petition is made because to change my position in personnel category would mean the loss of regular leave

> have not used. Another reason in making this decision is that I have to attend to the health of one of my children during the summer and I personally need a good recess. I hope to continue serving our society from the key position of classroom school teacher." (Translation ours).

A sworn statement by the Superintendent of Schools of Orocovis verifies Plaintiff's request. Plaintiff does not deny that he so informed the Superintendent of his desire to return to teaching. He does contend that shortly after notifying the Superintendent he changed his mind and now wanted to remain as Director. He claims he did not withdraw the letter because: (1) he did not believe it had any legal effect because it was never notified to anyone else; and (2) the decision to demote him had already been made at the Department level. (Plaintiff's Sworn Statement of September 30, 1978). Said decision was notified to Plaintiff by letter of June 21, 1977:

> "As you know the appointment to the position you now occupy expires with the termination of the present school year.
>
> "While we appreciate your collaboration we remind you that you are correspondingly reinstated to the position in which you have tenure in the system. To this effect our Personnel Division is proceeding to reinstate you to position number 0129 which is as Secondary School Teacher in Orocovis District effective at the commencement of the next school year." (Translation ours).

Under §1983 there exist a cause of action for political discrimination in public employment. *Elrod* v. *Burns*, 427 U.S. 347 (1976). It is clear here that Plaintiff had tenure as a high school teacher. However, he has come forth with no evidence demonstrative of tenure as a Director.[1] Though this does not

---

[1] There is nothing provided in 18 L.P.R.A. §§ 211 or 249 to the contrary.

automatically bar all avenues of relief, see: *Perry* v. *Sinderman*, 408 U.S. 593 (1972), it does affect Plaintiff's Motion.

As a non-tenured director with a year-to-year renewable contract, Plaintiff could permissably have been demoted at the end of the first year. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). But the fact that Plaintiff could validly be demoted does not mean that Plaintiff is unprotected from constitutionally impermissable factors within this same demotion. *Mt. Healthy City School District Board of Education* v. *Doyle*, 427 U.S. 274 (1972); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). The burden of showing a discriminatory reason for the demotion rested initially with Plaintiff. This initial burden of demonstrating a prima facie case of discrimination was met by Plaintiff. The complaint alleges: (1) that Plaintiff is of a certain political affiliation, par. 6, 7; (3) that this was known to Defendants, par. 9, 17; (4) that Plaintiff was qualified to remain in his promoted position, par. 8; (5) that despite these qualifications he was demoted, pars., 10, 11, 12 13; (6) that after this demotion the position was filled by a person of another political affiliation, pars. 13, 14; and this was exclusively politically motivated, par. 15. After this prima facie showing the burden of demonstrating a non-discriminatory reason for the demotion shifted to Defendants. *McDonnell Douglas Corp.*, supra, p. 802.[2] Thus, in the factual situation at hand Defendants, as the moving party in summary judgment, had the burden not only of demonstrating that a permissible factor could have motivated the demotion but also that no impermissible factor was involved. *Mack* v. *Cape Elizabeth School Board*, 553 F.2d 720 (C.A. 1, 1977). This is so even though at trial Defendants would have no burden and Plaintiff must prove that the impermissible factor was determinative. *Id.* at p. 722.

---

[2] Though the *McDonnell* test was formulated under a Title VII Civil Rights claim it is applicable by analogy to a § 1983 Civil Rights claim. See e.g. *Huntley* v. *Community School Board of Brooklyn*, 543 F.2d 979 (C.A. 2, 1976).

In the case at bar, though Defendants' affidavits are most adequate on the first point, and admittedly make a Plaintiff's case a weak one, they fail to address themselves to the second point. Under the exacting standard of summary judgment as outlined above Defendants' extrinsic evidence must have also demonstrated that no discriminatory factors influenced the demotion. *Mack* v. *Cape Elizabeth School Board*, supra. In that this decisional element is absent summary judgment is precluded.

We must of necessity address ourselves to one last point before concluding. Pending in this action is a Motion for leave to file an amended complaint which would add approximately one hundred named Plaintiffs and attempts to circumvent the Court's prior ruling denying class certification. A perusal of the amended complaint reveals that as regards the additional Plaintiffs, the complaint fails to meet the requirements of Rule 20 or 21 of F.R.C.P. and it is thus rejected.

The Motions for Summary Judgment and to Amend the Complaint are hereby DENIED. The Pretrial and trial settings are continued *sine die*.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 21st day of November, 1978.

/s/ JUAN R. TORRUELLA
Juan R. Torruella
U.S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 78-1156

JOSE ORTIZ RIVERA, *Plaintiff*,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary of Public Education in Charge of Personnel of the Commonwealth of Puerto Rico,

Defendants.

MOTION FOR RECONSIDERATION AND MEMORANDUM OF LAW IN SUPPORT THEREOF

TO THE HONORABLE COURT:

NOW comes the plaintiff and through its undersigned attorneys respectfully prays, alleges and set forth:

STATEMENT OF THE CASE

1. A complaint was filed on June 16, 1978 requesting declaratory and injunctive relief, back pay, damages and other relief arising under the First & Fourteenth Amendments to the Federal Constitution, Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, as amended, 42 U.S.C. Sec. 1983; 28 U.S.C. Sec. 2201, 2202, 18 L.P.R.A., Sec. 249 (e) and 18 L.P.R.A. 214, et seq., for plaintiff, Mr. Jose Ortiz Rivera on behalf of himself and all members of his class similarly situated, under Rule 23 of the Federal Rules of Civil Procedure. The jurisdiction of this Honorable Court was invoked under 28 U.S.C., Sec. 1331 and 1343(3) and (4), the amount in controversy exceeding $10,000.00 exclusive of interests and costs.

2. On August 21, 1978 this Honorable Court, upon hearing both parties, held that the present case could not be certified as a class action under Rule 23 of the Federal Rules of Civil Procedure because it did not meet the requisite of Rule 23(a)(1), which states, inasmuch as pertinent to the ruling of this Court, that:

> "One or more members of the class may sue or be sued as representative parties on behalf of all only if (1) *the class is so numerous that joinder of all members is impracticable.*"

3. Upon the aforementioned decision, plaintiff filed a Motion for Reconsideration on September 7, 1978. This Honorable Court denied the requested Reconsideration on the same grounds on September 28, 1978.

4. On October 2, 1978 plaintiff entered a "Motion Under Rule 15 F.R.C.P. Requesting Leave of Court to Amend Complaint," the amendment consisting of the addition as individual parties of all the purpoted members of the class in the original complaint.

5. On the 13th day of October, 1978, defendants filed a Motion entitled "Motion in Opposition to Plaintiff's Motions of October 3 and October 2, 1978 and for Extension of Time to Enter a Reply," basing their objections on the following:

(1) that "there has already been an Answer to the Complaint filed in the present case by the appearing co-defendants on September 28, 1978";

(2) that "there is a Motion for Summary Judgment filed in the present case by the appearing co-defendants on August 15, 1978, which we respectfully understand is dispositive of the instant case in its entirety", and

(3) that "there are various aspects in both of these Motions, which we respectfully submit are contrary to law and jurisprudence and to the local Rules of Procedure, which deserve to be amply discussed by these co-defendants before this

Honorable Court finally considers both of plaintiff's Motions before it"

6. On October 24, 1978 plaintiff filed an Informative Motion in which defendant's objections (1) and (2) were amply discussed and replied to.

7. On November 2nd, 1978 defendants filed a "Motion in Opposition to Plaintiff's request for Leave of Court to Amend Complaint and Memorandum of Law in Suport Thereof, "basing their objections in the following:

> "Motion should not be granted according to the interpretation of Rule 15 of Federal Rules of Civil Procedure."

This Motion was duly replied to on November 9, 1978 by way of Plaintiff's Motion to Opposition to Defendants Motion Opposing Plaintiff's Request to Amend Complaint.

8. On November 24, 1978 plaintiff received copy of this Honorable Court's Decision and Order of November 21st. 1978, which, denies Plaintiff's Motion Seeking Leave of Court to File an Amended Complaint, stating:

> "Pending in this action is a Motion for leave to file an amended complaint which would add approximately one hundred named plaintiffs and attempts to circumvent the Court's prior ruling denying class certification. A perusal of the amended complaint reveals that as regards the additional plaintiffs, the complaint fails to meet the requirements of Rule 20 or 21 of FRCP and is thus rejected."

Plaintiff respectfully requests a reconsideration of said Decision and Order, on the following:

ARGUMENTS

1. Rule 20 of the Federal Rules Civil Procedure does not bar joinder of the additional parties in this action. Rule 20(a) provides:

> "Permissive Joinder: All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally or in the alternative in respect of or arising out of the same

transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action . . . . . A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

Commenting on said rule, Wright & Miller, *Federal Practice and Procedure*, Vol. 7, § 1652-1653, states:

"The purpose of the rule is to promote trial convenience [*Hagler* v. *Admiral Corp.*, 248 F2d. 319 (CA 2d., 1957); *Anderson* v. *Frances I Du Pont & Co.*, 291 F. Supp. 705 (D.C. Minn., 1968); *General Inv. Co.* v. *Ackerman*, 37 FRD 38 (D.C. NY, 1964)] and expedite the final determination of disputes [*Rumbaugh* v. *Winifrede R.R. Co.* 331 F2d. 530 (CA 4th., 1964); *Stanley Works* v. *Haigger Potteries, Inc.*, 35 FRD 551 (D.C. Ill. 1964] thereby preventing multiple lawsuits . . . . . Joinder of parties under Rule 20(a) is not unlimited as is true of the joinder of claims under Tule 18(a). The rule imposes two specific requisites to the joinder of parties: (1) a right to relief must be asserted by, or against, each plaintiff or defendant relating to or arising out of the same transaction or occurrence and (2) some question of law or fact common to all the parties will arise in the action. Both of these requirements must be satisfied in order to sustain party joinder under Rule 20(a) . . . Instead of developing one generalized test for ascertaining whether or not a particular factual situation constitutes a single transaction or occurrence for purposes of Rule 20, the courts seem to have adopted a case by case approach . . . This approach is reminiscent of the logical relationship test which has been judicially developed as a gloss on the words 'transaction or occurrence' used in the compulsory counterclaim provision in Rule 13(a). For purposes of that rule, all *logically related* events entilling a person to institute a legal action against another generally are regarded as comprising a transaction or occurrence. The logical relationship test employed under Rule 13(a) seems consistent with the philosophy underlying the passage of Rule 20 that allows joinder of parties whenever the claims arise out of 'the same series of transactions or occurrences.' Moreover, *the flexibility* of this standard enables the federal courts to

> promote judicial economy by permitting all reasonable related claims for relief by or against different parties to be tried in a single proceeding under the provisions of Rule 20 . . . In a similar vein language in a number of decisions suggests that the courts are inclined to find that the claims before them arose out of the same transaction or occurrence when the *likelihood* of *overlapping proof and duplication in testimony* indicates that separate trials would result in delay, inconvenience and added expense to the parties and to the courts.

See also *Moore's Federal Practice*, Vol. 3-A, 20.01-20.05. As regards the courts' interpretations of what constitutes a "transaction or occurrence or series of transactions or occurrences," plaintiff respectfully refers this Court to the following decisions:

a) In *U.S.* v. *Mississippi*, 380 U.S. 128, 85 SCT. 808 (1965) an action brought by the U.S. Attorney General on behalf of negro citizens of the state of Mississippi for discriminatory practices of the State Board of Elections Commissioners, the Supreme Court stated:

> "The District Court said that the complaint improperly attempted to hold the six county registrars jointly liable for what amounted to nothing more than individual torts committed by them separately with reference to separate applicants. For this reason apparently it would have held the venue improper as to the three registrars who lived outside the Southern District of Mississippi and a fourth who lived in a different division of the Southern District, and it would have ordered that each of the other two registrars be sued alone. But the complaint charged that the registrars had acted and were continuing to act as part of a state-wide system designed to enforce the registration laws in a way that would inevitably deprive colored people of the right to vote solely because of their color. On such an allegation the joinder of all the registrars as defendants in a single suit is authorized by Rule 20(a) of the Federal Rules of Civil Procedure, ...
>
> These registrars were alleged to be carrying on activities which were part of a series of transactions or occurrences the validity of which depended to a large extent upon

"question[s] of law or fact common to all of them." Since joinder of the registrars in one suit was proper, the argument that venue as to some of them was not properly laid is also without merit. 28 U.S.C. § 1392(a) 1393(b) (1958 ed.)."

b) Similarly, a statewide policy of conditioning state employment on the signing of a loyalty oath satisfied the transaction requirement of Rule 20. *Gilmore* v. *James*, 274 F Supp. 75 (D.C. Tex., 1967), affirmed per curiam in 389 U.S. 572, 88 SCT. 695. (1968).

c) In *Lucas* v. *Seagrave Corporation*, 277 F. Supp. 338 (D.C. Minn., 1967), an action by former employees on behalf of themselves and others similarly situated against the employer for accrued pension rights, in which the District Court determined that a class action was not maintainable because plaintiffs failed to demonstrate that the class was so numerous that joinder of all members was impracticable and defendant moved the court for an order dismissing or severing the claims on the grounds of misjoinder, the Court stated:

"The Court feels that the defendant's contentions on this question are without merit. Suffice it to say that the joinder of these plaintiffs would constitute at the very least permissive joinder under the Federal Rules because their various and several claims all arise out of the same transaction or occurrence or series of interralated transactions. The common questions of law and fact obviously exist and have arisen already in this action. Rule 20(a) Fed. Rules of Civil Procedure", at page 347.

d) One individual and three corporate plaintiffs joined in an action against a corporation and its corporate parents alleging breach of contract, fraud and antitrust violations. Defendants sought severance, alleging that each franchise agreement was negotiated and executed at different times and places and that its contractual performance with respect to each franchise was dependent upon a diverse set of variables, and that the fraudu-

lent representations were made separately to different plaintiffs. In denying severance, the Court said:

> "Notwithstanding defendant's contentions, the court is not prepared to conclude that the tests for joinder have not been met. The contract claims may will be predicated on different transactions or occurrences. The court cannot, however, discount the fact that the fraud and antitrust claims respectively allege acts of misrepresentation and conspiracy which directly affected all plaintiffs. It has been held that such conduct may constitute a single transaction or occurrence for purposes of Rule 20(a)." *Mesa Computer Utilities, Inc.* v. *Western Union Computer Utilities, Inc.*, 20 FR Serv. 2d 72 (D.C. Del., 1975)

e) In *Balkind* v. *Tre-Pak Development Corp.*, 17 FR Serv. 2d 77 (E.D. Pa., 1973), an action brought by individual purchasers of single family dwellings alleging identical misrepresentations concerning the materials to be utilized in the building of the homes, proper joinder of plaintiffs was found, the Court stating:

> "To permit a joinder, the subject matter of a complaint must relate to the same or series of transactions in which all the joined parties were engaged with the defendants. The rule relating to permissive joinder permits such joinder if there is any question of law or fact common to all defendants and *does not require that all facts adduced be common to all.* We are of the opinion that plaintiffs' claims do contain common questions of fact which satisfy the requirements of Rule 20(a). *We believe it would be burdensome to require* each *plaintiff to prove the alleged defect* in *separate and repetitious actions.*" (Emphases provided, Citations omitted.)

f) In *Smith* v. *North American Rockwell Corp..*, 50 F.R.D. 515 (1970), plaintiffs brought an action against defendant employer for alleged discrimination based on race and color. The company was organized into several separate divisions based on the type of work the unit was to perform. These divisions were further divided into departments. Plaintiffs belonged to different departments and divisions. The court

denied joinder to plaintiffs on the grounds that their claims did not arise out of the same transaction or occurrence:

> "In the instant case, neither of the two requirements for proper joinder under Rule 20(a) is present. First, the Complaint itself indicates that the transactions and occurrences on which it is founded are several, not joint; diverse, not the same. Second, even a cursory examination of the potential factual and legal issues here presented reveals that again there is no common ground among these plaintiffs.
>
> The dissimilarity in transactions and occurrences claimed to render the defendant liable appears in the allegations in Paragraph IV and VI of the Complaint and the supporting Record. For example, plaintiff Smith alleges that she was discriminatorily denied a promotion in Department 916. Plaintiff Rountree complains of an entirely different occurrence, that he was discriminatorily denied an opportunity to attend Blueprint School. Mr. Rountree was employed in an entirely different capacity than that of Mrs. Smith. Mr. Rountree was subject to a collective bargaining agreement; Mrs. Smith was not. Again, plaintiff Snoddy's complaint arises out of a separate and distinct transaction. He complains that he was discriminatorily denied a promotion in the Materials and Processes Laboratory. Finally, plaintiff Dews complains that she was discriminatorily denied a promotion in the accounting department.
>
> The general notion that there may have been denials of promotion in at least three cases cannot support joinder, where any purported denials of promotion would have been made by different supervisory personnel in different labor union and work environments, with respect to employees performing different types of work.
>
> Moreover, litigation of even any purported general policy of defendant, as it might affect each plaintiff here, would inevitably focus in detail on the separate work histories of each plaintiff. On its face it would be practically impossible to litigate fairly and efficiently in one lawsuit all of the factual and legal issues which the present plaintiffs seek to raise. It would be unnecessarily burdensome and time-consuming for all the parties to do so. The determination of facts and scope of testimony and defenses relating

thereto, with respect to one plaintiff would have little relevance to issues raised by another plaintiff. Instead, there would be an evaluation of the administration of varying company rules by different supervisory personnel in different departments all in the context of dissimilar job functions. Such assessment would require a most precise and careful weighing of individual motives within quite different contexts."

g) Finnally, in *Mosley* v. *General Motors Corp.*, 497 F.2d. 1330 (C.A. 8th, 1974), plaintiffs brought action alleging that employer, an automobile company, and the union, incurred in racial discrimination in their employment practices. The District Court denied joinder following the reasoning of *Smith* v. *North American Rockwell*, supra. The Court of Appeals reversed, stating:

"In ascertaining whether a particular factual situation constitutes a single transaction or occurrence for purposes of Rule 20, a case by case approach is generally pursued. 7 C. Wright, Federal Practice and Procedure 1653 at 270 (1972). No hard and fast rules have been established under the rule. However, construction of the terms "transaction or occurrence" as used in the context of Rule 13(a) counterclaims offers some guide to the application of this test. For the purposes of the latter rule,

"Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.

Accordingly, all "logically related" events entitling a person to institute a legal action against another generally are regarded as comprising a transaction or occurrence. The analogous interpretation of the terms as used in Rule 20 would permit all reasonably related claims for relief by or against different parties to be tried in a single proceeding. *Absolute identity of all events is unnecessary.*

This construction accords with the result reached in United States v. Mississippi, 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed. 2d 717 (1965) .....

Here too, then, the plaintiffs have asserted a right to relief arising out of the same transactions or occurrences. Each

> of the ten plaintiffs alleged that he had been injured by the same general policy of discrimination on the part of General Motors and the Union. Since a "state-wide system designed to enforce the registration laws in a way that would inevitably deprive colored people of the right to vote" was determined to arise out of the same series of transactions or occurrences, we conclude that a companywide policy purpotedly designed to discriminate against blacks in employment similarly arises out of the same series of transactions or occurrences. Thus the plaintiffs meet the first requisite for joinder under Rule 20(a)."
> (Emphasis supplied. Citations omitted)

The second requirement of Rule 20(a), that there be a question of law or fact common to all plaintiffs, does not require that every question of law or fact in the action be common among the parties. The rule permits party joinder as long as there is at least one common question of law or fact. The 1966 Ammendment to Rule 20(a), comments Moore, supra "is to make certain that Rule 20(a) does not limit joinder of claims and to extend the liberal policy of joining claims in pleadings to actions involving multiple parties."

This second requirement has been amply discussed in *Mosley* v. *General Motors Corp.*, supra:

> "The second requisite necessary to sustain a permissive joinder under the rule is that a question of law or fact common to all the parties will arise in the action. *The rule does not require that all questions of law and fact raised by the dispute be common.* Yet, neither does it establish any qualitative or quantitative test of commonality. For this reason, cases construing the parallel requirement under Federal Rule of Civil Procedure 23(a) provide a helpful framework for construction of the commonality required by Rule 20. In general, those cases that have focused on Rule 23(a)(2) *have given it a permissive application so that common questions have been found to exist in a wide range of context.* 7C. Wright, Federal Practice and Procedure § 1763 at 604 (1972). Specifically, with respect to employment discrimination cases under Title VII, courts have found that the discriminatory character of a defendant's conduct is basic to the class, and the fact that the individual class members may have suffered different ef-

fects from the alleged discrimination is immaterial for the purposes of the prerequisite. In this vein, one court has said:

[A]lthough the actual effects of a discriminatory policy may thus vary throughout the class, the existence of the discriminatory policy threatens the entire class. And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class.

The right to relief here depends on the ability to demonstrate that each of the plaintiffs was wronged by racially discriminatory policies on the part of the defendants General Motors and the Union. The discriminatory character of the defendants' conduct is thus basic to each plaintiff's recovery. The fact that each plaintiff may have suffered different effects from the alleged discrimination is immaterial for the purposes of determining the common question of law or fact. Thus, we conclude that the second requisite for joinder under Rule 20(a) is also met by the complaint."

Furthermore, it has been repeatedly decided that if complaints unsuccessfully plead a class suit, the court should retain the action if the plaintiffs can proceed solely on their own behalf, as permissively joined plaintiffs under Rule 20(a). *Harris* v. *Palm Springs Alpine Estates, Inc.*, 329 F2d. 909 (C.A. 9th, 1964); *Zachman* v. *Erurn*, 186 F. Supp. 681 (50 Tex., 1959); *Lucas* v. *Seagrave Corporation*, supra.

Plaintiff respectfully sustains that both the commentary and the decisions cited favor a joining of party plaintiffs in the case at bar.

First, this action purpoted to be a class suit under Rule 23(a) and 23(b) (1) and (2) of the F.R.C.I.P. The original plaintiff, Mr. Jose Ortiz Rivera, borught this action "on behalf of himself and the members of the class described in paragraph 20 of this complaint." (Par. 3 of the Complaint). On August 21, 1978 this Honorable Court entered an Order denying class certification on the ground that the complaint, as filed, did not comply with the numerosity requirement of Rule 23(a)(1). As stated above

it has repeteadly been decided that in such a case the court should retain the action, and consider plaintiffs permissively joined under Rule 20(a).

Second, plaintiff sustains that the complaint as filed, complied with Rule's 20(a) requirements of asserting a right to relief relating to or arising out of the same transaction or occurrence or series of transactions and occurrences and having a common question of law or fact:

Paragraph 4(a) adequately identifies co-defendant Carlos Chardon and alleges that "he has ultimate responsibility for the supervision and administration of the Department including determination of the employment status of the Plaintiff *and those in his class.*" (Emphasis supplied)

Paragraph 4(b) adequately identifies co-defendant Oscar Ramos and alleges that "he has responsibility for the supervision and administration of personnel matters in the Department, including the determination of the employment status of the plaintiff *and those in his class.*" (Emphasis supplied)

Paragraph 13 alleges a state-wide discriminatory policy based on political reasons. It further alleges that all persons discriminated against occupied supervisory positions in the school system.

Paragraph 20 alleges the basis for the claims of all parties purpoted to be joined in this action by way of the Amended Complaint. It details the factual situation common to all of them.

Paragraph 21 further supports the statewide discriminatory policy alleged: "The members of the class reside and work throughout Puerto Rico . . ."

Paragraph 22 specifically alleges the questions of law and fact common to all of them.

Paragraph 23 specifically alleges political discrimination towards all of them.

The Complaint specifically seeks relief for Plaintiff *and all members of the class.* (pages 6 and 7).

Third, it cannot be sustained that the events which give rise to this claim are not logically related, since they all arise out of the same discriminatory policy of the Department of Education. Furthermore, all demotions complained of took place between May and July of 1977.

Fourth, certainly these claims, if individually pursued, would cause an overlapping of proof and a duplication of testimony, since the same persons are responsible for the demotions in all cases, and acted pursuant to the same discriminatory policy.

As the complaint alleges a state-wide policy of discrimination for political reasons, it satisfies the "same transaction or occurrence" requirement of Rule 20(a) as stated by the United States Supreme Court in *U.S.* v. *Mississippi*, supra, and the other decisions cited. Furthermore, the complaint also satisfies the common question of law or fact requirement, as stated in *Mosley* v. *General Motors Corp.*, supra. All persons seeking reddress from the defendant were subjects of its discriminatory policies because of their membership or political association with the PPD or political parties other than the NPP. As is stated in *Mosley*, "the discriminatory character of the defendant's conduct is basic to each plaintiff's recovery."

2. Rule 21 of the Federal Rules of Civil Procedure does not bar plaintiff's amended complaint. This Honorable Court stated no grounds for denying plaintiffs amended complaint, other than consigning that it did not comply with the requirements of Rule 20 or 21 of the Federal Rules Civil Procedure. A reading of Rule 20 made it rather easy for plaintiff to determine in what way this Court understood that it had not complied with its provisions as it clearly states two requirements that must be met for a permissive joinder of parties to proceed. The same cannot be said of Rule 21. The latter provides:

> "Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the

> court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

The only part of the above cited rule which requires some kind of an action by a party in a suit, is the one that states that parties may be dropped or added by order of the court on motion of any party. Plaintiff therefore, assumes that this was the requirement that this Court referred to as not having been complied with by Plaintiff.

This being the case, plaintiff respectfully sustains that this requirement was complied with. Together with the Amended Complaint, Plaintiff filed a Motion entitled "Motion Under Rule 15 F.R.C.P. Requesting Leave of Court to Amend Complaint." It did not file as of right an amended complaint without seeking leave of court for the complaint had already been answered. In such motion Plaintiff stated:

> "5. That on account of the rulings of the Court, the best alternative left to the individual members of the class is to have the complaint amended in such manner that each of them becomes a co-plaintiff.
>
> 6. That on this date Plaintiffs are submitting an amended complaint, including as co-plaintiffs those members of the class who have requested to be represented by the undersigned attorneys in this case. Now wherefore, it is respectfully requested from this Honorable Court that it permit Plaintiff to file the attached Amended Complaint and enter the necessary order to that effect."

Even though said Motion made no reference to Rule 21 of the Federal Rules Civil Procedure, Plaintiff submits that the requirement of said rule was met, since he sought leave of court to add parties to this action by way of the amended complaint.

It is true that some courts have pointed out that the specific provisions of Rule 21 of the Federal Rules Civil Procedure govern the general provisions of Rule 15 of the Federal Rules Civil Procedure. Nevertheless, it has been repeteadly decided that the liberal approach towards amendments of Rule 15

should be highly persuasive in determinations under Rule 21. So, in *Kamininsky* v. *Abrams*, 41 FRD 168 (DC NY., 1966), in which plaintiff sought, prior to service of a responsive pleading, an order granting leave to join additional parties defendant in his derivative action against a corporation, the court said that while the specific provisions of Rule 21 governed the general provisions of Rule 15, *the liberal standards upon which amendments were to be granted when leave of the court was required under Rule 15 should guide the courts on Motions under Rule 21.* Accordingly, the court held that plaintiff should be permitted to add parties defendant. The same was held in *Holtzman* v. *Richardson*, 361 F. Supp. 544 (DC NY., 1973); *Gibbs* v. *Titelman*, 369 F. Supp. 38 (DC Pa., 1973); *Orloff* v. *Hayes*, 7 FRD 75 (DC NY., 1946).

Recent decisions, have been even more liberal in their approach to amendments holding that when no responsive pleading has been served, Rule 15(a), and not Rule 21, governs the amendment of complaints and no leave of court must be sought to add or drop parties by way of an amended complaint. *McLellan* v. *Mississippi Power & Light Co.*, 526 F2d. 870 (CA 5th. 1976); *Bransted* v. *Schmidt*, 324 F. Supp. 1232 (DC Wis., 1971); *Jones* v. *Electrodyne Co.*, 224 F. Supp. 599 (DC Mo., 1963); *City Bank* v. *Glenn Const. Corp.*, 68 FRD 511 (DC Hawaii, 1975); *U.S.* v. *Sinclair*, 347 F. Supp. 1129 (DC Del., 1972); *Healtherton* v. *Playboy*, 60 FRD 3721 (DC Cal., 1973).

Thus, Plaintiff respectfully sustains that he complied with Rule 21 of the Federal Rules Civil Procedure and that his motion to add parties should be granted, both under the spirit and the judicial interpretations of said Rule.

3. Plaintiff's motion for leave to file an amended complaint does not attempt to cicumvent the Court's prior ruling denying class certification.

> "The class action was an invention of equity . . . . . mothered by the practical necessity of providing a *procedural device* so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity

> from their equitable wrongs." *Montgomery Ward & Co.*, v. *Langer*, 168 F2d. 182-187 (CA 8th, 1948) (Emphasis supplied)

As previously stated this suit was commenced as a class action pursuant to Rule 23 of the Federal Rules Civil Procedure alleging that Plaintiff, together with more than a hundred other persons who were found in a similar situation, as described in paragraph 8 of the complaint, comprised a class meeting the requirements of said Rule. This Honorable Court held from the bench on August 21, 1978 that said individuals could not be certified as a class because they did not comply with the numerosity requirement of Rule 23(a). On September 7th, 1978, Plaintiff filed a "Motion for Reconsideration of Ruling" expressing and arguing why the class should be certified as previously prayed for. Said motion, was denied by this Honorable Court on September 28, 1978 and notified to Plaintiff on October 2, 1978.

Rule 23, as *Montgomery*, supra., clearly states, is a procedural device. Thus, it cannot defeat an individuals substantive rights. In Plaintiff's "Motion in Opposition to Defendants' Motion Opposing Plaintiff's Request to Amend Complaint", filed on November 9, 1978, Plaintiff respectfully stated its position concerning the effects of a denial of certification of a class suit:

> "It cannot be the purpose of Rule 23 of the Federal Rules Civil Procedure that individuals asserting a class action be barred from claiming their rights whenever a Court does not certify its petition for a class action."

As Rule 23 cannot defeat an individuals substantial rights, promptly after the denial by this Honorable Court of the Reconsideration of its ruling denying class certification, Plaintiff filed a Motion seeking leave of court to file an amended complaint, stating:

> "That on account of the ruling of the Court, the best alternative left to the individual members of the class is to have the complaint amended in such a manner that each of them becomes a co-plaintiff."

Plaintiffs understood that this was the best procedural mechanism available to further their rights, inasmuch as it avoided a multiplicity of suits, with the consequences of additional costs to Defendants, duplicity of proof and testimony and an overcrowding of the court's docket.

Precisely to protect the rights of purported class members to assert their claims individually, and to further the purposes of Rule 23 of the Federal Rules Civil Procedure, the courts have repeatedly decided that "the commencement of a class action tolls the statute of limitations as to all asserted members of a class who would have been parties had the suit been permitted to continue as a class action." *American Pipe and Construction Co.* v. *Utah*, 414 US 552, 554 (1974); *Barrett* v. *U.S. Civil Service Commission* 439 F. Supp. 216, 218 (DC DC, 1977); *McCarthy* v. *Kleindienst*, 562 F2d. 1269 (1977); *Goldstein* v. *Regal Crest*, 62 FRD 571 (Pa., 1974). In *American Pipe*, supra, well after the statute of limitations had run, the district court determined that the suit could not proceed as a class action because of the failure to satisfy the numerosity requirement. Eight days after this ruling the entities originally sought to be represented moved to intervene. The Supreme Court, reversing the district court held that such intervention was timely and appropriate. It stated:

> "A contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure. Potential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable. In cases such as this one, where the determination to disallow the class action was made upon considerations that may vary with such subtle factors as experience with prior similar litigation or the current status of a court's docket, a rule requiring successful anticipation of the determination of the viability of the class would breed needless duplication of motions. We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a

class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the action been permitted to continue as a class."

Plaintiff respectfully sustains that his Motion seeking leave of Court to file an amended complaint of October 2, 1978 was, thus, timely filed and a proper exercise of his substantial rights, not circumventing this Honorable Court's prior decision.

Finnally, Plaintiff respectfully refers this Court to his "Motion in Opposition to Defendant's Motion Opposing Plaintiff's Request to Amend Complaint" of November 9, 1978, pages 3 to 8, in which Plaintiff extensively discusses the procedural basis for granting permission to file an amended complaint in the case at bar.

NOW WHEREFORE, the Plaintiff requests from this Honorable Court the following:

1. That it reconsider its ruling of November 21, 1978 and that it order that the amendment complaint which was tendered be filed.

2. That it set an oral hearing for the discussion of this Motion.

Respectfully submitted.

In San Juan, Puerto Rico, this 29th day of November, 1978.

CANCIO, NADAL & RIVERA
G.P.O. Box 4966
San Juan, Puerto Rico 00936

/s/ By HARRY R. NADAL ARCELAY
Harry R. Nadal Arcelay

PROOF OF SERVICE

I hereby certify that on this same date a copy of the foregoing Motion for Reconsideration and Memorandum of Law in Sup-

port Thereof was sent to: Francisco R. Agrait Llado, Esq., attorney for defendants, Department of Justice, P.O. Box 192, San Juan, Puerto Rico, 00902; Luis Miranda Correa, Esq., Ofic. 505 Asociacion de Maestros de Puerto Rico, Hato Rey, Puerto Rico; Luis Munoz Rivera, Esq., Cond. El Centro I, Of 607, Hato Rey, Puerto Rico and Luis E. Gandia Arguelles, Esq., Box 20343, Rio Piedras, Puerto Rico, 00928.

/s/ HARRY R. NADAL ARCELAY
Harry R. Nadal Arcelay

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL ACTION NO: 79-198
TRIAL BY JURY

JUAN FUMERO SOTO,

Plaintiff,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of the Commonwealth of Puerto Rico,

Defendants.

COMPLAINT

TO THE HONORABLE COURT:

NOW COMES the Plaintiff and through his undersigned attorneys very respectfully claims, alleges, and requests as follows:

1. This is an action for declaratory and injunctive relief, back pay, damages, and other relief arising under the First and Fourteenth Amendments to the United States Constitution; Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, as amended, 42 U.S.C. § 1983; 28 U.S.C. § 2201, 2202; 18 L.P.R.A. § 249 (e), 18 L.P.R.A. 211, and 18 L.P.R.A. 214, *et seq.*

2. The jurisdiction of this Court is founded upon 28 U.S.C. § 1331 and 1343 (3) and (4). The amount in controversy exceeds $10,000.00 exclusive of interests and costs.

3. The Plaintiff in this action is a resident of Puerto Rico and employee of the Department of Public Education of the

Commonwealth of Puerto Rico (referred to hereinafter as "the Department").

4. The Defendants in this action are:

(a) Carlos Chardon, who is, and at all times herein relevant was, the Secretary of Public Education of Puerto Rico. In this capacity, he has ultimate responsibility for the supervision and administration of the Department, including determination of the employment status of the Plaintiff. Defendant Chardon is sued in his individual and official capacities.

(b) Oscar Ramos, who is, and at all time herein relevant was, the Assistant Secretary of Public Education in Charge of Personnel of Puerto Rico. In this capacity, he has responsibility for the supervision and administration of personnel matters in the Department, including the determination of the employment status of the Plaintiff. Defendant Ramos is sued in his individual and official capacities.

5. On November 2, 1976, Puerto Rico held a gubernatorial election. In this election, the candidate of the Popular Democratic Party (referred to hereinafter as the "PDP") was incumbent Governor Rafael Hernadez Colon. Former Governor Hernandez Colon was defeated by Governor Carlos Romero Barcelo, who was the candidate of the New Progressive Party (referred to hereinafter as the "NPP"). Governor Romero Barcelo took office on January 2, 1977.

6. Governor Romero Barcelo appointed Mr. Herman Sulsona as Secretary of Public Education, and Sulsona, in turn, appointed defendant Ramos as Assistant Secretary of Public Education in Charge of Personnel. Both Sulsona and Defendant Ramos assumed their positions on or about January 3, 1977. Both Sulsona and Defendant Ramos are members and active in the affairs of the NPP.

7. On or about March 13, 1977, Mr. Sulsona resigned as Secretary of Public Education, and Governor Romero Barcelo appointed Defendant Chardon as his successor. Defendant Chardon assumed the position of Secretary of Public Educa-

tion on or about March 31, 1977. Defendant Chardon is a member and active in the affairs of the NPP.

8. The Plaintiff mentioned in the caption of this complaint was employed by the Department of Education during the 1976-77 school year, without permanent status; in a locally and/or federally funded position as General Supervisor I - School and Community Relations Program.

He had been promoted to such position, on the basis of his merits, from a lower position in which he did have and enjoy permanent status within the meaning of 18 L.P.R.A. 211 and was protected by 18 L.P.R.A. 214, *et seq.* Plaintiff was demoted to his previous position, such demotion to take effect at the beginning of the 1977-78 school year. This last action on the part of Defendants also deprived Plaintiff of his constitutional rights and, in particular, constituted a violation of his rights under the First and Fourteenth Amendments of the Constitution of the United States. The aforementioned position in which Plaintiff was employed during the 1976-77 school year involved functions of school administration. It was not a policy-making position, and Plaintiff did not participate in the formulation of policies relating to the operation of the Department. He had to follow policies formulated at the Department's level.

9. Plaintiff is, and at all times herein relevant was, member and active in the affairs of the PDP or political parties other than the NPP. On information and belief, the defendants are, and at all times herein relevant were, aware of Plaintiff's political association with its party, even if they did not know him personally.

10. On or about June, 1977, Plaintiff received a letter, signed by Julio Cintron Lopez, Director of the Personnel Division of the Department, ____ removing him from his position, effective at the beginning of the 1977-78 school year, and reassigning him to his previous position in the Department. A copy of the aforesaid letter is attached to this complaint as *Attachment A*, and made a part hereof. Plaintiff's permanent

position, to which he was assigned as per the corresponding letter, is lower in rank and compensation than the non permanent he held until them, and, therefore, his reassignment constitutes a demotion. On or about June 1977, Plaintiff wrote a letter to Defendant Chardon, in which he objects his removal from his position and announces that he is taking the necessary steps towards the corresponding legal action. A copy of such letter is attached to this complaint as *Attachment B*, and made a part hereof.

11. The letter received by Plaintiff sets forth no reason for his removal from the non permanent position he held and there was no legitimate reason for such removal. No notice, hearing, nor any other form of due process was awarded to plaintiff.

12. At the beginning of the 1977-78 school year, Plaintiff was actually removed from the non permanent position in which he was employed during the 1976-77 school year, and demoted to his permanent position in the Department. As of the date of this complaint, he is serving in the latter position.

13. Substantially all of the persons who were employed during the 1976-77 school year without permanent status in locally and/or federally funded positions as Executive Directors, Directors, Assistant Directors, General Supervisors, Zone Supervisors, Superintendents, Assistant Superintendents, and Curriculum Technicians and who were members and/or active in the affairs of the PDP or political parties other than the NPP were removed from their positions at the end of the 1976-77 school year or the beginning of the 1977-78 school year; and substantially all of the persons who were employed during the 1976-77 school year without permanent status in the aforesaid positions and who were not members and/or active in the affairs of the PDP or political parties other than the NPP were not removed.

14. The supervisory position in which Plaintiff was employed during the 1976-77 school year has been filled for the 1977-78 school year.

15. Plaintiff alleges that the Defendants removed him from his supervisory position at the beginning of the 1977-78 school year and demoted him to his previous position solely because of his political association with the PDP or parties other than the NPP, and that he would not have been removed and demoted but for such association.

16. Plaintiff alleges that the aforesaid action by the Defendants constitutes a violation of his rights under the First and Fourteenth Amendments to the United States Constitution. He also alleges that said action is contrary to and contravenes the rights acquired by him under the provisions of 18 L.P.R.A. 214 *et seq.* He further avers that as career publi servant (empleado publico de carrera) he had the legitimate expectation to remain in the position to which he had been promoted (and from which he was demoted by Defendants) and that he could not be removed or demoted from that position except for cause.

17. The Defendants knew, or reasonably should have known, that removing Plaintiff from his supervisory position and demoting him to his previous position because of his political association with the PDP or parties other than the NPP was a violation of his rights under the First and Fourteenth Amendments to the United States Constitution. The Defendants acted maliciously, willfully, and in wanton and reckless disregard of Plaintiff's constitutional rights when they took the aforesaid action, in violation of Plaintiff's civil rights, as provided in Section 1983, 42 U.S.C.A.

18. The action of the Defendant in removing Plaintiff as stated above constituted a violation of his rights under the First and Fourteenth Amendments to the United States Constitution; constituted a violation of his civil rights as provided in Section 1983, 42 U.S.C.A., and constituted a violation of his rights under the laws of Puerto Rico, specifically (in addition to § 214 mentioned in paragraph 16), under Section 249 (a) and (e), of Title 18, L.P.R.A.

WHEREFORE, the Plaintiff respectfully requests from this Court that it:

1. Declare that the Defendants:

   (a) in removing the Plaintiff from the position in which he was employed during the 1976-77 school year, violated his rights under the First and Fourteenth Amendments to the United States Consitution and under Section 1983 of 42 U.S.C.A.; and also violated his rights under Sections 249 (a) and (e) and 214, *et seq.* of Title 18 L.P.R.A.

2. Order that Defendants:

   (a) reinstate Plaintiff to the position in which he was employed during the 1976-77 school year and from which he was dismissed or demoted in violation of his rights under the statutes mentioned in the complaint.

   (b) pay to Plaintiff full back pay for the period from the date of his removal or demotion from the positions in which he was employed during the 1976-77 school year until the date of his reinstatement to that or other substantially equivalent position, including prejudment interests, less any pay received by him from the Department during the period in question.

   (c) pay to the Plaintiff all damages proximately resulting from defendants' wrongful actions;

   (d) pay to the Plaintiff punitive damages in the amount of $50,000.00; and

   (e) be enjoined permanently from removing any person from a non-policy making position with the Department because of such person's political association.

3. Award to the Plaintiff:

   (a) costs and reasonable attorneys' fees; and

   (b) such other and further relief as this Court shall find to be just and proper.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 2nd. day of January, 1979.

HIRAM R. CANCIO
HARRY R. NADAL ARCELAY
ANA MATILDE NIN TORREGROSA
CANCIO, NADAL & RIVERA
GPO BOX 4966
SAN JUAN, PUERTO RICO 00936

LUIS MIRANDA CORREA
OF. 505 - EDIF. ASOC. DE MAESTROS
DE PUERTO RICO
HATO REY, PUERTO RICO

LUIS MUNOZ RIVERA
CONDOMINIO EL CENTRO I
OF. 607
HATO REY, PUERTO RICO

LUIS E. GANDIA ARGUELLES
Box 20343
RIO PIEDRAS, PUERTO RICO 00928

/s/ BY: Ana Matilde Nin Torregrosa
ANA MATILDE NIN TORREGROSA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 79-198

JUAN FUMERO SOTO,

Plaintiff,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of the Commonwealth of Puerto Rico,

Defendants.

ANSWER TO THE COMPLAINT

TO THE HONORABLE COURT:

Appearing through their undersigned attorneys and without submitting to the jurisdiction of this Honorable Court, defendants Carlos Chardon, Secretary of Education of the Commonwealth of Puerto Rico, and Oscar Ramos, Assistant Secretary In Charge of Personnel of the Department of Education of the Commonwealth of Puerto Rico, submit the following answer to the complaint:

GENERAL ALLEGATIONS

1. The Complaint fails to state a claim against these appearing parties upon which any relief may be granted by this Honorable Court.

2. All conclusions of law alleged in the Complaint are disputed insofar as applicable to the factual allegations therein.

3. All factual allegations contained in the Complaint, except those specifically admitted below and as therein qualified, are denied.

SPECIFIC ALLEGATIONS

4. Defendants admit paragraphs 4a and b with the clarification that Mr. Ramos' official title is Assistant Secretary of Public Education in Charge of Personnel; Par. 5 & 14 admitted.

5. Defendants admit the following paragraphs of the Complaint in part, and deny them in part:

Paragraph 3 - Defendants admit that plaintiff is an employee of the Department of Education of the Commonwealth of Puerto Rico.

Paragraph 6 - The first two sentences are admitted, the last sentence is denied.

Paragraph 7 - It is admitted, except for the last sentence which is denied; Mr. Carlos Chardon is but a member of Governor Romero Barcelo's cabinet, the Secretary of Public Education.

Paragraph 10 - It is admitted that Mr. Julio Cintron Lopez sent a letter to plaintiff reinstating him to his permanent position. It is also admitted that on June 30, 1977, plaintiff wrote a letter to defendant Secretary Chardon, expressing his objection as to the decision announced to him in Mr. Cintron Lopez's letter to him. The rest of the allegations contained in this paragraph are denied.

Paragraph 12 - Denied as stated in the Complaint. At the begining of the school year 1977-78, plaintiff was reinstated to his permanent position; a position in which he is presently serving.

Paragraph 8 - It is accepted that plaintiff was employed by the Department of Education during the 1976-77 school year, in a non permanent position as General Supervisor I - School

and Community Relations Program. As of April 4, 1978 he was reassigned to a position of Director Second Unit IV. The rest of the allegation is denied.

6. Paragraph 9 is Denied For Lack of Information and Belief.

7. The following paragraphs are Denied: 1, 2, 11, 13, 15, 16, 17, 18.

AFFIRMATIVE DEFENSES

1. The complaint fails to state an actual case or controversy between plaintiff and defendants cognizable in this Court.

2. The complaint fails to state adequate statutory grounds to support the jurisdictional grounds alleged therein.

3. The complaint fails to state specific facts adequate to support the jurisdictional grounds alleged therein.

4. The complaint fails to state specific acts of the defendants which amount to a deprivation of any of plaintiff's federally protected rights.

5. The complaint fails to state a federal cause of action against defendants upon which any relief may be granted by this Honorable Court.

6. At all times pertinent to this complaint, the defendants have acted according to law and in the good faith performance of their duties as employees of the Commonwealth of Puerto Rico.

7. The controversy is limited to the interpretation of Commonwealth law and presents no federal questions.

8. Plaintiffs have not exhausted the administrative remedies available to them under Commonwealth Law and therefore cannot claim lack of due process.

9. Plaintiff has not exhausted the judicial remedies available to them in the Commonwealth Courts and this Honorable

Court should therefore abstain from entertaining the controversy prior to such exhaustion.

10. Whether or not plaintiff had any right subject to due process protection of the Federal Constitution hinges upon the interpretation of Commonwealth law which presents no federal question.

11. The complaint fails to state facts showing that the circumstances of this case warrant the intervention of this Honorable Court in the administrative proceedings of the system of Courts of Commonwealth of Puerto Rico.

12. The complaint fails to state specific facts showing any acts of defendants Carlos Chardon, Secretary of Public Education of the Commonwealth of Puerto Rico and Oscar Ramos, Assistant Secretary of Public Education in Charge of Personnel, amounting to a deprivation of plaintiff's federally protected or guaranteed rights.

13. Any damage, if any, suffered by plaintiff as a result of the acts complained of were the result in full or in part of plaintiff's actions and failure to act.

14. The doctrine of primary jurisdiction applies to this case and thus plaintiffs must first pursue the administrative remedy available to them.

15. The complaint is barred by the statute of limitations.

WHEREFORE, these appearing defendants respectfully pray from this Honorable Court, the Complaint herein be dismissed, taxing plaintiff with defendants costs, expenses and attorney's fees and such other relief as this Honorable Court may deem just and proper.

Respectfully submitted in San Juan, Puerto Rico, this 26th day of March, 1979.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 79-198

JUAN FUMERO SOTO,

Plaintiff,

v.

CARLOS CHARDON, *et al.*,

Defendants.

ORDER

Defendants' motion for judgment notwithstanding the jury's verdict has required a detailed examination of the jurisprudence regarding qualified immunity of state officials from damages. For the reasons stated in the following Memorandum, the defendants' motion for judgment notwithstanding the verdict is denied.

The Court exercises its equitable power to order that the Commonwealth of Puerto Rico Department of Education reinstate all those plaintiffs who have remained in their employ to the respective positions each held, or its functional equivalent, at the time of their demotion.[1] This reinstatement may be accomplished in accordance with the dictates of sound administrative practices. Therefore, reinstatement may be delayed until the end of the present school year, but not later than the start of the next school year.

The Department is further ordered to pay plaintiffs' full back pay in the amount to be computed in each case,[2] and to take all other affirmative relief necessary to make the plaintiffs whole. Any delay in reinstatement pursuant to the administrative practices described above will not vitiate the requirement that back pay be awarded up to and including the time reinstatement takes place. Those teachers who chose to leave the Department will be allowed back pay calculated for the period

they were in reduced positions until they voluntarily terminated their teaching positions.

However, as a matter of law and in light of the jury's factual finding that the defendants did not have a malicious intent to deprive plaintiffs of their rights, the relief herein granted exhausts the remedies and damages available to plaintiffs. Despite the bifurcation of this trial into liability and damage elements, the jury's findings vitiates the need to hold damage trials.

With respect to any claim for which no statute of limitation defense was pending, final judgment will enter pursuant to Fed. R. Civ. P. 54(b), once the filing requirements of Notes 1 and 2 shall have been complied with and approved by the Court.

The Court will consider a petition for plaintiff's attorney's fees, along with the appropriate briefing and documentation of time involved when final judgment has been entered according to the terms of this Order.

Notes

(1) In approximately 10-15 of these cases, defendants have asserted a defense that the claims were barred by the applicable statute of limitations. This defense was specifically reserved when these cases were consolidated. This issue is presently before the Court of Appeals for the First Circuit in related "Chardon" teacher discrimination cases. This Court will await that decision before dismissing the complaints or entering judgment on behalf of the individual plaintiffs therein, pursuant to this Court's Memorandum Order of January 28, 1981.

The parties are directed to meet at the earliest possible time for the purpose of providing this Court with a list of those cases where judgment can be immediately entered in accordance with this Order, and those which would be controlled by the ruling of the Court of Appeals. This list shall be filed with the

Court within 30 days of the filing of this Order. If the parties are not in agreement on a particular case, they will immediately note the basis of their disagreement, specifying the date the demotion letter was sent, the date received, and the date the particular complaint was filed. The Court will consider any supplemental information the parties deem appropriate.

(2) The calculation of the back pay amount should not require the intervention of the Court. The parties are directed to meet and calculate the amount owed each plaintiff. A list setting forth the amount due each plaintiff must be filed within 30 days of the filing of this Order. Judgment will then be entered accordingly.

SO ORDERED.

ENTER: May 7, 1981

/s/ ROBERT A. GRANT
Robert A. Grant
Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 79-198

JUAN FUMERO SOTO,

Plaintiff,

v.

CARLOS CHARDON, *et al.*,

Defendants.

MEMORANDUM

Fifty-five school teachers and administrators, plaintiffs in these 55 consolidated cases, brought individual suits charging that they were unlawfully discriminated against and demoted due to their association with and membership in the Popular Democratic Party (PDP), a political party in the Commonwealth. Each plaintiff's theory is that Carlos A. Chardon, then Secretary of Education for the Commonwealth, and his Assistant Secretary for Personnel, Oscar Ramos, members of the governing New Progressive Party, unlawfully demoted each of the plaintiffs at dates ranging from May till June of 1977, in violation of the First and Fourteenth amendments, 42 U.S.C. § 1983, and various Puerto Rican statutes. 18 L.P.R.A. §§ 249(e),[3] 211 and 214 *et seq.* Actions under Puerto Rican law come within both § 1983 and its jurisdictional predicate, 28 U.S.C. § 1343(3). *Examining Board of Engineers* v. *Flores de Otero*, 426 U.S. 572 (1976). It is impermissible to discriminate in the work place based upon a person's political affiliations. *Elrod* v. *Burns*, 427 U.S. 347 (1976); *Branti* v. *Finkel*, 445

[3] 18 L.P.R.A. § 249(e) prohibits school officials from making personnel changes based on an employee's political affiliation.

U.S. 507 (1980); *Perry* v. *Sindermann*, 408 U.S. 593 (1972).[4] These suits were brought against Chardon and Ramos in their individual and official capacities.[5]

Before trial, the individual plaintiffs, each represented by the same group of attorneys, indicated that a large portion of their proof at trial would consist of establishing a pattern of unlawful discrimination, requiring repetitious testimony from a number of plaintiffs. Inasmuch as the factual and legal issues, the attorneys and the parties were common to all these cases, these suits were ordered consolidated pursuant to Fed. R. Civ. P. 42(a). Subsequently other judges in this district transferred a number of "Chardon" cases for inclusion in the consolidated trial. This trial was bifurcated, and was to consider only the liability issues. Fed. R. Civ. P. 42(b). *See* Court Order, January, 1981. In essence, the jury's findings on the issue of liability in this captioned case was made binding upon the parties in all of the consolidated cases. The damages issues were not consolidated.

Each of the plaintiffs herein was demoted from the position of school principal or other supervisory position in which he or she did not have tenure. Upon demotion as ordered by the Department he or she was returned to the tenured position as school teacher or to lesser administrative rankings, as previously occupied. No one was discharged. While the complaints of most teachers requested declaratory relief, reinstatement, back pay and punitive damages, approximately ten to fifteen suits were filed by teachers who chose to leave the

---

[4] The affirmative defense that the plaintiffs were confidential or policymaking employees, and hence, not protected from discharge, was not raised as an issue in this case.

[5] Since Chardon resigned as Secretary before trial, the new Secretary of Education is automatically substituted in her official capacity for Chardon, Fed. R. Civ. P. 25(d). The caption has not been formally changed to reflect this. Chardon, of course, remains a defendant in his individual capacity.

Department during the pendency of these lawsuits. These ex-teachers were no longer interested in the equitable relief of reinstatement, but in turn sought a more substantial monetary judgment than those who remained employees of the Department.

These cases were tried to a jury. With the agreement of counsel, the following instruction was given pertaining to the defendants' affirmative defense that they had acted in good faith while demoting each plaintiff, and thus were protected by a qualified official immunity;

> We have made reference to the affirmative defense of good faith and a qualified immunity.
>
> The jury is instructed that the defendants were each public officials of the Commonwealth of Puerto Rico. They were acting in their official capacity at all times pertinent to this case.
>
> And, as such, they did enjoy a qualified immunity that protects them if they acted with a good faith belief based upon reasonable grounds that their actions were necessary.
>
> It is the existence of reasonable grounds for the belief formed and acted upon at the time, and in light of all the circumstances, coupled with a good faith belief, that affords a basis for a qualified immunity of State officials for acts that are performed in the course of their official conduct.[6]
>
> The Commonwealth officials who are defendants in this case are not immune from liability for actions taken under Section 1983 if that official knew or should have known that the action taken within his sphere of official responsibility would violate the Constitutional or legal rights of the teachers affected, *or if the official took the action with the malicious intention of causing a deprivation of Constitutional or legal rights or other injury to the teachers.*[7] (emphasis added).

---

[6] This paragraph is taken from *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48 (1974).

[7] This paragraph is taken from *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975).

The jury returned a verdict for the plaintiff and against each defendant. The Court then defined malicious intent,[8] and requested that the jurors return to their deliberations to answer the following interrogatory:

> Following a finding by the jury that the defendants Carlos Chardon and Oscar Ramos, individually and in their official capacities are liable to the plaintiffs in this consolidated cause, the jury is now instructed to deliberate further for the sole purpose of answering this question: Did the defendant Carlos Chardon *have a malicious intent to deprive plaintiffs of their constitutional or other rights?*
>
> And a similar question with respect to the other defendant: Did the defendant Oscar Ramos *have a malicious intent to deprive the plaintiffs of their constitutional or other rights?* (emphasis added).

The jurors answered "No" with respect to each defendant. No objection was made regarding this interrogatory. It is noted here that the language in the prior charge and the special interrogatory is identical. The Court now must give effect, if possible, to both the general verdict for plaintiff, and the interrogatory answer that defendants lacked malicious intent.

(I) *Punitive Damages*

The Supreme Court has construed 42 U.S.C. § 1983 to allow an award for compensatory damages. It has not, as yet, definitively ruled as to whether punitive damages are also available:

> To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional

---

[8] I am going to read to you a definition from a couple of cases as to what that constitutes.

"Malice is the intentional doing of a wrongful act without just cause or excuse with an intent to inflict an injury or under circumstances that the law will imply an evil intent."

And the other, from the other case, I read as follows: "Maliciousness does not necessarily mean actual malice or ill-will, but intentional doing of a wrongful act without legal or social justification.

> rights, *there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages.* See *Imbler* v. *Pachtman*, 424 US, at 442 (White, J., concurring in judgment).

Carey v. *Piphus*, 435 U.S. 247, 256-57 (1978) (emphasis added) (footnote omitted). The footnote following this holding further explained the Court's position:

> *This is not to say that exemplary or punitive damages might not be awarded in a proper case under § 1983 with the specific purpose of deterring or punishing violations of constitutional rights.* See, *e.g.*, *Silver* v. *Cormier*, 529 F.2d 161, 163-164 (CA10 1976); *Stengel* v. *Belcher*, 522 F.2d 438, 444 n.4 (CA6 1975), cert. dismissed, 429 U.S. 118 (1976); *Spence* v. *Staras*, 507 F.2d 554, 558 (CA7 1974); *Caperci* v. *Huntoon*, 397 F.2d 799, 801 (CA1), cert. denied, 393 U.S. 940 (1968); *Mansell* v. *Saunders*, 372 F.2d 573, 576 (CA5 1967); *Basista* v. *Weir*, 340 F.2d 74, 84-88 (CA3 1965). Although we imply no approval or disapproval of any of these cases, we note that there is no basis for such an award in this case. *The District Court specifically found that petitioners did not act with a malicious intention to deprive respondents of their rights or to do them other injury, see n.6, supra, and the Court of Appeals approved only the award of "non-punitive" damages, 545 F.2d 30, 31 (1976).*
>
> We also note that the potential liability of § 1983 defendants for attorney's fees, see Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94-559, 90 Stat. 2641, amending 42 U.S.C. § 1988, provides additional—and by no means inconsequential—assurance that agents of the State will not deliberately ignore due process rights. See also 18 U.S.C. § 242, the criminal counterpart of § 1983.

Id. at 257 n.11 (emphasis added).

The Court of Appeals for the First Circuit has held that punitive damages are available against § 1983 defendants "when there are aggravating circumstances." *Fact Concerts, Inc.* v. *City of Newport*, 626 F.2d 1060, 1067 (1st Cir. 1980), citing *Alicea Rosado* v. *Garcia Santiago*, 562 F.2d 114, 121 (1st Cir. 1977) (bad faith) and *Caperci* v. *Huntoon*, 397 F.2d 799, 801 (1st Cir.), *cert. denied*, 393 U.S. 940 (1968) (unwarranted in-

vasion of privacy). In *Rosado*, *supra*, it was stated: "[I]ntentional interference with constitutional rights, standing alone, is not enough; there must also be 'aggravating circumstances.' " 562 F.2d at 121. Citing the standards used by other circuits, the *Rosado* court continued: "and the Third Circuit has described the standard as 'malicious and wanton disregard' of a plaintiff's rights." *Id.* (citation omitted).

The jury's answer to the interrogatories in this case ended any claim for punitive damages. As the plaintiff's attorneys acknowledged, the award of punitive damages is a decision for the trier of fact. Although the parties failed to raise the issue, any decision granting or denying punitive damages must include an assessment of the conduct in question, evidentiary inferences and evaluations pertaining to motive and knowledge. *Alicea Rosado* v. *Garcia Santiago*, *supra*. *See also Lee* v. *Southern Home Sites Corp.*, 429 F.2d 290, 294 (5th Cir. 1970). *See also* Annot., 14 A.L.R. Fed. 608 (1970). It became apparent that failure to have questioned this liability jury regarding the defendants' intent would have required a full repetition of the liability trial testimony in any subsequent trial on the issue of punitive damages. However, based upon the jury's findings, no punitive damages can now be awarded. With this in mind, the Court will now address defendants' contention that the jury's interrogatory answers unwittingly opened the door to an inconsistent verdict.

(II) *The Motion For Judgment Notwithstanding The Verdict*

Defendants moved for a directed verdict at the close of the evidence offered by plaintiff, and again at the close of defendants' evidence on the official immunity defense. The Court reserved its decision upon that motion. After the jury's answer that defendants lacked a malicious intent, defendants moved for judgment notwithstanding the verdict. Defendants contend that these answers entitle them to prevail in their affirmative defense of qualified immunity, and that the general liability verdict is contradicted by the interrogatory answers to the

effect that defendants had no malicious intent. In the alternative, they claim as a matter of law that the answers bar any subsequent claim for damages from the individual defendants.

The Court is not persuaded in the first instance that the findings are contradictory. To that extent, judgment notwithstanding the verdict is denied. The Court is persuaded, however, that the jury's answers do preclude the award of damages against the defendants in their individual capacity based upon an independent question of law.

The standard for ruling on a motion for judgment notwithstanding the verdict is the same as the standard for a directed verdict motion. The district court is to review the evidence in the light most favorable to the prevailing party, giving the plaintiff here the benefit of all the factual inferences that the evidence fairly supports without weighing the credibility of the witnesses. Fed. R. Civ. P. 50(b). *Fact Concerts, Inc.* v. *City of Newport, supra,* 626 F.2d at 1064. *See also Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690, 696 (1962); *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943). Reviewing the testimony presented in this case by that standard, the Court cannot conclude that the evidence presented was insufficient to permit a rational jury from reaching both the verdict of liability and finding on the lack of malicious intent. Therefore, under the applicable standard the Court must effectuate both the general verdict and interrogatory answers. At this point, however, the Court must state its view of the evidence that was presented. The evidence of political discrimination and the defendants' personal involvement in the demotions was not overwhelming. Candidly, a reasonable man could have found the plaintiff's proof unconvincing. The Court will not invade the jury's province to substitute its credibility determinations and reach an alternative judgment. But in this case the jury had two bites of the apple so to speak, and both must be harmonized by the Court, if possible, under a fair reading of the answers. Fed. R. Civ. P. 49(b). *See Gallick* v. *Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 119 (1963).

Fed. R. Civ. P. 49 and the cases which construe it indicate that, "[W]here there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962). Although that case discussed Rule 49(a), while this case arises under Rule 49(b), the principles expressed remain equally valid. In fact, if the difference between the general verdict and interrogatory answers is perceived as possibly inconsistent, the general admonition is that the answers to special interrogatories should control, rather than the general verdict.[9] The power to enter judgment on findings inconsistent with the general verdict "is a constitutional one and does not violate the Seventh Amendment since the jury's findings of fact are not being reexamined but, as a reasonable regulation of practice, their more specific findings of fact are allowed to control their general conclusion embodied in the general verdict." 5A Moore's Federal Practice ¶ 49.04; Wright and Miller, Federal Practice and Procedure: Civil § 2513. In summary, while harmonizing the answers the more general liability verdict must give way to the more specific lack of intent finding. This principle will be borne in mind when the qualified immunity issues are considered.

(III) *Qualified Immunity From Damages*

A. *Liability*

The nature of the qualified immunity defense at common law and in § 1983 cases has been judicially established commencing

---

[9] *Blackwell* v. *Cities Service Oil Co.*, 532 F.2d 1006 (5th Cir. 1976); *Nimnicht* v. *Dick Evans, Inc.*, 477 F.2d 133 (5th Cir. 1973); *Elliot* v. *Watkins Trucking Co.*, 406 F.2d 90, 92 (7th Cir. 1969); *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379, 406-07 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964); *United States* v. *City of Jacksonville, Arkansas*, 257 F.2d 330 (8th Cir. 1958); *Golden North Airways, Inc.* v. *Tanana Publishing Co.*, 218 F.2d 612 (9th Cir. 1954).

with *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974).[10] In *Scheuer*, the Governor of Ohio, the University President and National Guard officers involved in the Kent State University killings claimed absolute official immunity from damages under § 1983. This discussion is of particular significance in the case before us inasmuch as *Scheuer* addresses the scope of immunity available to state executive officials occupying positions of authority analogous to those held by the defendants here. The Court began by noting the reasons why officials had been held immune from suits for personal damages at common law:

> The concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity. While the latter doctrine—that the "King can do no wrong"—did not protect all government officers from *personal* liability, *the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability*. This official immunity apparently rested, in its genesis, on two mutually dependent rationales: *(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.*

416 U.S. at 239-40 (emphasis added) (footnotes omitted).

In holding that a qualified official immunity exists, Justice Harlan's prior admonitions on this subject were restated, followed by the Court's holding.

> "To be sure, the occasions upon which the acts of the head of an executive department will be protected by the

---

[10] The Court has made clear that immunities under § 1983 are to be read in harmony with the general principles of tort immunities and defenses. *Imbler* v. *Pachtman*, 424 U.S. 409, 418 (1976). *See also Tenney* v. *Brandhove*, 341 U.S. 367 (1951).

> privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' *Spalding* v. *Vilas*, *supra*, at 498—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits. 360 U.S., at 573-574."
>
> *These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.* It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Id. at 247-48 (emphasis added).

In this case, plaintiff concedes that a qualified official immunity clothed both Chardon and Ramos inasmuch as the Commonwealth's Secretary of Education is given practically limitless discretionary powers in the personnel area. 18 L.P.R.A. § 211 *et seq.* While this discretionary power cannot be used to ratify political discrimination in promotion and demotion policies, the *Scheuer* Court apparently contemplated a de facto "sliding scale" of qualified immunity protection for public officials. In *Butz* v. *Economou*, 438 U.S. 478 (1978), the Court again confirmed that like the state cabinet officials and state governor in *Scheuer*, the federal cabinet appointee in *Butz* deserved the highest level of protection from suits against him, *i.e.*, below the level of absolute immunity. Implicitly, this requires a heightened degree of knowledge, personal participation and malice by the higher executive offi-

cial in an allegedly discriminatory action. *See also Williams* v. *Anderson*, 562 F.2d 1081, 1101 (8th Cir. 1977).

Scheuer was followed by *Wood* v. *Strickland*, 420 U.S. 308 (1975), which examined the scope of immunity for members of a school board in disciplinary proceedings. Essentially, the Court again sought to steer between the two weighty and competing concerns in this area—making public officials responsible for violating citizen's constitutional rights, without emasculating the officials' power, and will, to make difficult or unpleasant decisions when necessary. *See also Butz* v. *Economou*, *supra*, at 503.

Comparing the *Scheuer* defendants with the *Wood* officials, the latter occupied much lower executive positions. The *Scheuer* analysis would indicate that a lesser degree of qualified immunity would be sufficient to protect the *Wood* defendants. The "variation" in the scope of the immunity accorded the officials in *Scheuer* was at a low ebb in *Wood* v. *Strickland* for this reason. In *Wood* the Court held:

> Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 *if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional or other injury to the student.*

Id. at 322 (emphasis added).

In the present case, the jury was instructed, without objection in accord with this dual Wood standard. Parsing this standard, the "should have known" language can be characterized as a negligence standard. It is an objective measure of the defendants' conduct, although the "knew" portion is subjective in the sense that it required an examination of the defendants' state of mind. Via the conjunctive "or" the Court connected the second branch to the *Wood* standard, a subjective intent test which inquires whether the official maliciously intended to injure the plaintiff. Based upon the jury's answer to the special

interrogatory, there was no such impermissible intent in this case. Therefore, the "knew or should have known" standard is the branch plaintiffs must depend upon here.

The compelling policy dilemma of the immunity decisions is the need to balance the plaintiff's compensation for injuries with the need to protect the decision making process. *Barr* v. *Mateo*, 360 U.S. 564, 565 (1959). To complicate any analysis under the *Wood* holding, however, the Court has left further instructions which must be integrated with the liability analysis.

B. *Damages*

As noted in Wood:

> *Liability for damages for every action which is found subsequently to have been violative of a student's constitutional rights and to have caused compensable injury would unfairly impose upon the school decisionmaker the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties.* School board members, among other duties, must judge whether there have been violations of school regulations and, if so, the appropriate sanctions for the violations. Denying any measure of immunity in these circumstances "would contribute not to principled and fearless decision-making but to intimidation." *Pierson* v. *Ray*, *supra*, 386 U.S., at 554, 87 S.Ct., at 1218. *The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students.* The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure.

Id. at 319-20 (emphasis added) (footnote omitted).

In addition to the *Scheuer* and *Butz* "sliding scale" of immunity, and the *Wood* liability standard, the Court has indicated

here that merely satisfying the *Wood liability test* may not be sufficient to allow an award of *damages*. Once liability exists, damage awards still depend to some degree on the subjective determination of whether the official acted in good faith, *e.g.*, whether the "mistaken" constitutional deprivation is reasonable or unreasonable. Rather than only one standard by which to provide a readily discernible litmus test to judge official immunity, it is apparent from the Court's opinion that the analysis regarding damages is more complicated. An official could make a "reasonable" mistake protected by official immunity, a mistake which might otherwise constitute an actionable violation of 42 U.S.C. § 1983.

The Court concluded *Wood* analysis by making the following admonition regarding damages:

> *A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that this action cannot reasonably be characterized as being in good faith.*

Id. at 322 (emphasis added).

Before evaluating the verdict and interrogatory answers in light of the *Wood* damage holdings, it appears that integrating these damage teachings with the liability standards yields a presumably unintended conflict. Under § 1983 and the *Wood* liability standard of "knew or should have known," liability can exist for non-deliberate conduct. However, in the absence of an impermissible motivation, or deliberate disregard for citizen's rights, damages should not be awarded. The conflict does not stem from faulty analysis, but is a product of the requirement that a balance be struck which protects both citizens and officials. In effect, qualified immunity protects officials like Chardon and Ramos from damages even when they objectively should have known that violations of constitutional rights were occurring, but where they took these actions in the absence of malicious or bad motivation. While a specific answer to the question of whether the mistake was "reasonable" or "unreasonable" would clearly answer this concern, no jury finding exists on that question.

Although the Supreme Court has specifically limited the *Wood* v. *Strickland* decision to the context of school discipline, *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975), these damage teachings have been expanded upon and utilized in other areas. Rather than slavishly utilizing the *Wood* v. *Strickland* decision, these cases indicate that the standard for awarding damages against officials is higher than mere negligence on the part of the official involved.[11]

The appropriate test, drawn from the Supreme Court's opinions, was stated by the Seventh Circuit in *Thomas* v. *Pate*, 516 F.2d 889, 891 n.2 (7th Cir.), *cert. denied*, 423 U.S. 877 (1975), and again restated as the holding of *Bonner* v. *Coughlin*, 545 F.2d 565, 568 (7th Cir. 1976) (en banc), *cert. denied*, 435 U.S. 932 (1978) (footnote omitted):

> [A] plaintiff must prove that the defendant has acted within the sphere of his official responsibility, "with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff] or "with such disregard to the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."

Neither test is satisfied here. First, the jury finding that there was no malicious intent precludes the Court from finding the officials acted out of an impermissible motivation. Nor does the evidence presented at trial support such a proposition.

Second, plaintiff claims that defendants objectively acted with a deliberate disregard of his established constitutional rights, *e.g.*, the employee's right not to be discharged for his

---

[11] The Supreme Court has left open the question of whether negligence on the part of state officials is sufficient to constitute a constitutional violation. *See Baker* v. *McCollan*, 443 U.S. 137 (1979). The cases collected in *Bonner* v. *Coughlin*, 545 F.2d 565, 568 n.8 (7th Cir. 1976) (en banc), indicate the majority view is that mere negligence is not enough. The First Circuit holding is to that effect. *Page* v. *Sharpe*, 487 F.2d 567 (1st Cir. 1973). *See also Bogard* v. *Cook*, 586 F.2d 399 (5th Cir. 1978), *cert. denied*, 444 U.S. 883 (1979).

political affiliations. As an example, plaintiff cites *McCormick* v. *Edwards*, 479 F. Supp. 295 (M.D. La. 1979), where the district court ruled that public officials could not rely on their subjective claim that they had acted in good faith, while pleading ignorance of clearly established due process rights. The defendants in that case knew of the due process rights but claimed not to know these rights applied to the plaintiff. *Id.* at 299.

This type of analysis is not helpful in the case at bar where Chardon and Ramos have never claimed ignorance of the law, or of the teacher's right not to be discharged for his political affiliations. Defendants do not claim good faith in light of an unexpected, late-breaking constitutional doctrine as discussed in *Woods*. Their theory thoughout this litigation has been that the demotions were for nonpolitical reasons, and that their personal role in these decisions, particularly Secretary Chardon's, was extremely limited. Although plaintiff is correct in asserting that the right in question is a clear proposition of constitutional law it is proof of motive that is the key to unlocking this case.

The burden of proving what can conveniently be analogized as the two-sided qualified immunity coin, with proof of the officials' good faith on one side, or proof of their bad faith on the other, has been seen as mutually exclusive propositions. The First Circuit succinctly stated this in *Gomez* v. *Toledo*, 602 F.2d 1018, 1020 (1st Cir. 1979), *rev'd*, ___ U.S. ___, 100 S.Ct. 1920 (1980):

> It has now been firmly established by a long line of cases that in a civil rights action for damages, public officials acting in their official capacity enjoy a qualified immunity that protects them if they acted with a good faith belief based upon reasonable grounds that their actions were necessary. *Or to put it conversely*, a plaintiff in such an action must prove that the public official acted in bad faith, meaning with malice or recklessness. *Butz* v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978); *O'Connor* v. *Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992,

43 L.Ed.2d 214 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *Tenney* v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).[12]

(emphasis added).

---

[12] The Supreme Court has not passed upon the burden of proving, as opposed to pleading, the official immunity defense. The First Circuit originally had charged the plaintiff with the burden of pleading and proving bad faith on the part of the officials involved. *Gomez* v. *Toledo*, 602 F.2d 1021 (1st Cir. 1979). This decision was reversed by the Supreme Court which held that § 1983 plaintiffs did not have to anticipate what is an affirmative defense, *i.e.*, the good faith actions of the officials involved, by pleading that they acted in bad faith. *Gomez* v. *Toledo*, 446 U.S. 635 (1980). Justice Rehnquist concurred in the Court's otherwise unanimous opinion, but noted his belief that the burden of persuasion, apart from the burden of pleading, remained undecided.

The Court cited several cases to indicate that the burden of persuasion lies with the officials. *McCray* v. *Burrell*, 516 F.2d 357, 370 (4th Cir. 1975) (en banc), *cert. dismissed*, 426 U.S. 471 (1976); *Gilker* v. *Baker*, 576 F.2d 245 (9th Cir. 1978); cited in *Gomez* v. *Toledo*, 446 U.S. at 638 n.5. No contrary rulings were cited.

Further research disclosed a number of cases which leave the burden of proving good faith to the defendant officials. When *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971) was remanded, the Second Circuit placed the burden on the police officers to show they had reasonable beliefs regarding the legality of their actions. 456 F.2d 1339, 1347-48 (2d Cir. 1972). *See also Thompson* v. *Burke*, 556 F.2d 231 (3d Cir. 1977); *Skehan* v. *Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 61-62 (3d Cir.), *cert. denied*, 429 U.S. 979 (1976); *Bryan* v. *Jones*, 530 F.2d 1210 (5th Cir.) (en banc), *cert. denied*, 429 U.S. 865 (1976); *Glasson* v. *City of Louisville*, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975); *Safeguard Mutual Insurance Co.* v. *Miller*, 472 F.2d 732 (3d Cir. 1973); *Benford* v. *American Broadcasting Companies, Inc.*, 502 F. Supp. 1148 (D. Md. 1980); *Fujiwara* v. *Clark*, 477 F. Supp. 822, 832 (D. Hawaii 1979); *Eckerd* v. *Indian River School District*, 475 F. Supp. 1350, 1368 (D. Del. 1979); *Cameron* v. *Montgomery County Child Welfare Service*,

In this case, defendants contend that the finding that they did not act with a malicious intent is tantamount to a finding that they acted in good faith. If such were the case, defendants would have succeeded in proving that they are clothed with a qualified immunity in this case. Likewise, plaintiff contends that the general liability finding constitutes a finding of bad faith in the objective sense, although they concede that the jury found the defendants did not have the subjective intent to deprive plaintiffs of their rights. Candidly, these admittedly less than definitive findings do not yield what either party would like them to. A finding that the defendants objectively "knew or should have known" discrimination was occurring may be sufficient for a general finding of liability but it does not satisfy the requirements for damages. Defendants proffered and the jury accepted proof that they did not act with a malicious intent. This does not, however, indicate that they acted in good faith.

The peculiar context of the present case simply does not permit the expected converse finding, discussed by the First Circuit, to occur. Instead, readily discernible elements of each alternative appear and can be rationalized to yield a coherent result. This result, however, convinces us that further legal damages cannot be awarded.

---

471 F. Supp. 761, 764 (E.D. Pa. 1979); *Forsyth* v. *Kleindienst*, 447 F. Supp. 192, 202 (E.D. Pa. 1978), *modified on other grounds*, 599 F.2d 1203 (3d Cir. 1979); *Eubanks* v. *Clarke*, 434 F. Supp. 1022, 1033-34 (E.D. Pa. 1977); *Mack* v. *Johnson*, 430 F. Supp. 1139, 1147 (E.D. Pa. 1977), *aff'd*, 582 F.2d 1275 (3d Cir. 1978); *Burkhart* v. *Saxbe*, 397 F. Supp. 499, 502 (E.D. Pa. 1975).

In this case, the burden of proof on the qualified official immunity defense was allocated to the defendants. This instruction was accepted without protest by both parties. Therefore, they are bound by it. Fed. R. Civ. P. 51. *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801, 808 (1949) (civil case); *Johnson* v. *United States*, 318 U.S. 189, 200 (1943); *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936); 5A Moore's Federal Practice 51.04 at 51-28, 51-30 to 51-35; *Redmond* v. *Baxley*, 475 F. Supp. 1111, 1115 (E.D. Mich. 1979).

If the proof of the parties is less than definitive upon the defense of qualified official immunity, then the policy concerns of *Scheuer* and *Wood*, the need to protect the decision making powers of public officials, particularly state cabinet members, comes to the fore. The case at bar presents at best ambiguous findings regarding the motivation these officers brought to this situation. In such an ambiguous case, where the Court can exercise its equitable powers to make plaintiffs whole, further damages are not warranted.

This comports with the Supreme Court's instructions regarding § 1983 damages. Although by its own terms § 1983 creates a species of tort liability that admits of no immunities, *Owen* v. *City of Independence, Missouri*, 445 U.S. 622, 650-51 (1980), qualified immunity for public officials has been a product not of legislation, but of "judicial thinking" upon the conflicting policies involved. *Butz* v. *Economou*, *supra*, 438 U.S. at 501-02. Applying this judicially created immunity in accord with the dictates of prior decisions, if damages are not limited we run the risk of "dampen[ing] the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, Judge).

Where the Supreme Court has considered the role of damages as compensation for violations of constitutional rights, it has indicated that restraint is recommended. Absent congressional authorization, a court may also be impelled to think more carefully about whether the type of injury sustained by the plaintiff is normally compensable in damages. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Justice Harlan further noted, "[F]or people in Bivens' shoes it is damages or nothing." *Id.* at 410. That is not the case here. As will become clear, the plaintiff here can be given the bulk of the relief sought via equity, without infringing upon the policy concerns discussed by the Court in the qualified official immunity cases. Because that is the case, the efficacy of protecting the official's decision making power deserves full concern, in accord with the teachings of the Supreme Court. For these

reasons, no further proceedings to establish damages are necessary, nor can any be awarded in this case.

(IV) *Injunctive Relief*

While the scope of the qualified immunity defense prohibits the further award of damages, the question of whether equitable relief may be granted poses an entirely different issue. The dominant policy concern which prohibited damages, *i.e.*, the potential chilling effect upon decision makers, is no longer present. The impact that this has on the efficacy of allowing relief was touched upon, albeit briefly, by the Court in *Wood* v. *Strickland*, 420 U.S. at 314-15 n.6, which stated in part, "[I]mmunity from damages does not ordinarily bar equitable relief as well."

A more definitive examination of this reasoning can be found in *Rowley* v. *McMillan*, 502 F.2d 1326 (4th Cir. 1974). In that case, a class action filed by persons arrested, assaulted, and expelled from a speaking engagement of then President Nixon, sought declaratory relief against similar actions in the future. The district court found the law enforcement officers involved had no constitutional basis for their actions, and granted a preliminary injunction on plaintiff's behalf. The Court of Appeals rejected the officials' defense of qualified official immunity. Referring to *Barr* v. *Mateo* and *Scheuer* v. *Rhodes* (the same portions of which have been restated again in this memorandum, *supra*) the Fourth Circuit indicated its reasons for upholding injunctive relief:

> These two quotations demonstrate that the immunity rule, whatever its scope, is grounded upon the inhibitory effect of suits for money damages. Manifestly, actions for injunctive relief do not have that effect. The federal defendants have cited no case, and we have found none, which holds that the immunity doctrine insulates a public official or public employee from injunctive relief to prevent what would otherwise be an illegal act on his part. *Scheuer* states that the immunity doctrine stems from the same considerations that generated the doctrine of sovereign immunity. That immunity is embodied in the

> eleventh amendment, so that it is significant to note that since Ex Parte Young, 209 U.S. 123 (1908), the law has been settled that, notwithstanding, the eleventh amendment, in an appropriate case a state official may be enjoined by a federal court from future violation of federal law.
>
> Thus, we conclude that the preliminary injunction is not vulnerable to the claim of official immunity.

Id. at 1332.

The reasoning in *Rowley* v. *McMillan* is followed by *Stanford Daily* v. *Zurcher*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978). *See also Jacobson* v. *Tahoe Regional Planning Agcy.*, 566 F.2d 1353 (9th Cir. 1977), *aff'd in part, rev'd in part*, 440 U.S. 391 (1979); *Safeguard Mutual Insurance Co.* v. *Miller*, 472 F.2d 732, 734 (3d Cir. 1972); *Martin* v. *Wray*, 473 F. Supp 1131, 1138 (E.D. Wis. 1979). For these reasons, any ruling on the equitable requests for reinstatement of the plaintiffs, and the concomitant back pay for the period during which they have been demoted, is not made under the stringent concerns previously discussed.

Both parties understood, previous to trial and afterwards, that the decision for or against ordering reinstatement was peculiarly within the discretion of the trial court.[13] Equitable relief has traditionally been the province of the Court. While the Court indicated a preliminary intention of being guided by the jury's finding, the jury's verdict was merely advisory in this respect, not a mandatory finding that binds the Court. It

---

[13] The facts which gave birth to the claim for equitable relief were adjudicated by the jury. The plaintiffs are wholly incorrect when they state that this aspect of the case was tried by the jury. In fact, the plaintiffs had previously taken the position that had the jury found for the defendants, the district court, nevertheless, could order reinstatement and other relief independent of that verdict. To now make such an inconsistent argument does not advance their case.

was always accepted by the parties that the right to trial by jury did not extend to the right of reinstatement. *See Ross* v. *Bernhard*, 396 U.S. 531, 533 (1970).

What plaintiffs did succeed in doing at trial was to establish a cause of action under Section 1983, despite the fact that the jury's findings preclude damages against the defendants involved. The proof of a § 1983 action, absent a claim of qualified official immunity requires only two elements: (1) That the defendants acted under color of state law, and (2) that a constitutional right has been denied. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 150 (1970).

Since there was a violation, "an equity court possesses some discretionary power to award damages in order to do complete justice." *Walters* v. *Marathon Oil*, 7th Cir. March 9, 1981 (No. 80-13-) citing *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). In *Albemarle*, a Title VII case, the Court held that back pay should not be withheld without special reason. When a public employee is discharged in violation of his First Amendment or other constitutional rights, he is entitled to reinstatement and back pay. *Eckerd* v. *Indiana River School District*, 475 F. Supp. 1350, 1365 (D. Del. 1979).

Weighing all of the competing interests in this case, all of the teachers in this consolidated case are ordered to be reinstated and given back pay, pursuant to the terms of the attached order.

This award is made in light of the testimony presented at trial, the verdict of the jury, and the interrogatory answers as interpreted by this Court. In equity, if other remedies are made available to the plaintiffs, this award would of necessity have to be fully reconsidered and evaluated. "[S]ince it is the historic purpose of equity to secure complete justice, the courts are able to adjust the remedies so as to grant the necessary relief, *Equal Employment Opportunity Commission* v. *General Tel. Co. of Northwest, Inc.*, 599 F.2d 322 (9th Cir. 1979), *aff'd*, 100 S.Ct. 1698 (1980) . . . ," quoted in *Walters* v. *Marathon Oil*, *supra*. This award is also in accordance with the principles of § 1983 relief.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 79-198

JUAN FUMERO SOTO, *Plaintiff*,

v.

CARLOS CHARDON, *et al.*, *Defendants*.

FINAL ORDER AND JUDGMENT

On May 12, 1981, this Court entered an extensive order directing that plaintiff educators be reinstated to their previous positions in the Puerto Rican school system, and that back pay awards be computed to make plaintiffs whole. After delays caused by defendants' inability to provide this Court with the necessary information in a timely fashion, the Court is now ready to rule on the back pay issue. In 48 of the 55 consolidated cases, the parties have agreed to the proper measure of compensation. Pursuant to the terms of the May order, the Court now orders defendants to pay each plaintiff the amounts agreed upon.

CASE NO.	NAME	AMOUNT
78-1156	Jose Ortiz Rivera	$6,000.00
79-66	Carmen Nunel Rivera	
79-67	Syraida Rosa Cardona	$8,400.00
79-70	Carmen L. Negron Marin	$1,800.00
79-72	Aida Rodriguez Rios	$2,450.00
79-73	Carmen H. Montes Velez	$1,818.75
79-74	Carmen Garcia Rosado	$4,545.56
79-76	Noelia Torres de Cantres	$8,332.76
79-82	Iraida Sanchez Marquez	$6,000.00
79-83	Antonio Rodriguez Rivera	$ 720.00
79-85	Edda I. De Ayala Lafuente	$ 196.48
79-167	Josefa Marrero Ayala	No back pay
79-169	Nilsa Cardona Flores	$3,600.00

CASE NO.	NAME	AMOUNT
79-170	Jose A. Alvarado	$3,120.00
79-176	Elba M. Colon Torres	$1,837.50
79-179	Carmen Ortiz Lemois	$7,200.00
79-182	Andres A. Hernandez Ortiz	$4,345.00
79-183	Aurora Sierra Pizarro	$ 375.00
79-185	Virginia Otero Arroyo	$4,350.00
79-194	Maria V. Pagan Seda	$1,300.00
79-197	Ana Mercedes Ortiz Colon	$7,175.00
79-198	Juan Fumero Soto	$1,920.00
79-199	Dora Castro de Aguilar	$3,600.00
79-200	Antonio Vega Ortiz	$ 300.00
79-203	Jose A. Surillo Rodriguez	$1,571.71
79-206	Reinaldo Rodriguez Solivan	$9,120.00
97-209	Sylvia M. Denis	$6,000.00
79-210	Bienvenido Castro Del Valle	$7,200.00
79-212	Kremlly Rodriguez Valentin	$2,450.00
79-213	Elba Rosario de Bravo	$ 520.00
79-215	Lydia Munoz Morales	$ 710.00
79-218	Angel Luis Marrero Gonzalez	$1,570.04
79-219	Ramon Norat Zayas	$2,050.00
79-220	Charles H. Quiles Mariani	No back pay
79-221	Carmen T. Lugo Sotero	$ 112.50
79-224	Iris Camelia Velez Morales	$5,340.00
79-227	Jorge O. Principe Galarza	$3,600.00
79-323	Santiago Gonzalez Velazquez	$1,084.96
79-325	Bienvenido Rivera Diaz	$1,200.00
79-330	Angela Colon Santiago	$2,400.00
79-332	Joaquin Cruz Mendez	$2,400.00
79-333	Ursula Aguilar Quintero	$8,400.00
79-334	Aminta Rivera Cardonna	No back pay
79-335	Roberto Cruz Cruz	$1,920.00
79-164	Jose Aponte de la Torre	-0-
79-79	Efrain Tacoronte Ruiz	-0-
79-336	Nelson Velez Quinones	$2,450.00
79-357	Cristina Cancel Cuevas	$1,200.00
79-358	Maria D. Guerra Navarro	$2,400.00
79-361	Francisco Bonilla Ocasio	No back pay
79-362	Heriberto Gallardo Gutierrez	No back pay

In seven (7) cases, the parties have not been able to agree. In two of these cases, 79-79, Efrain Tacoronte Ruiz, and 79-326, Carmen M. Morales Hernandez, the disputes are apparently only upon the proper figure involved, and the differences are comparatively minor. While the Court will not enter a final back pay figure in these two cases without further consultation with counsel, these two plaintiffs are to be granted the reinstatement relief set out in the May order.

Despite the two month period granted to gather information, in one case, 79-66, Carmen Nunez Rivera, defendants have indicated they are uncertain as to her status. The defendants are directed to immediately ascertain whether the suggested back pay figure of $3,600 is correct. If it is, then she should be accorded the same relief as the 48 other cases. Should the defendants continue to disagree as to the amount of back pay, they are directed to promptly notify this Court of that fact and the basis of their disagreement. This plaintiff is to be accorded the same reinstatement relief as the plaintiffs which have already been discussed.

In 79-164, plaintiff Jose E. Aponte De la Torre claims he was demoted from a position as Vocational Director III to teacher of Industrial Arts. It is ordered that he be reinstated according to the terms of the May order to his former position. The remainder of that case regarding his claim that demotion from one position caused the loss of another part-time positio and further damages will require further consultation.

Inasmuch as the pay discrepancy is quite large, the Court will entertain further proceedings to deal with this problem.

Similarly, there are polar differences between the parties' position regarding Nos. 79-329, Juan Rivera Pagan, 79-364, Julio E. Colon, and 79-188, Carmen D. Perez Roman. These plaintiffs contend they were not demoted but dismissed, and have consequently far greater damages. Defendants admit the dismissals, but contend they are unrelated to the political problems found in the main consolidated cases. All relief, monetary and reinstatment, will be stayed in these cases pending further proceedings.

Final judgments will be entered in accordance with the foregoing terms of this order in accordance with F.R.C.P. 54(b).

Filing this order, along with the contemporaneous filing of an order dismissing defendants' final motion to overturn the Court's May 12 order, largely concludes the lengthy and protracted proceedings in these cases. This Court takes the opportunity to reiterate that the reinstatement relief ordered in May is to be provided prior to August 3, 1981, the beginning of the new school year. No stay of that relief will be made by this Court at this late date. The prompt compliance with the terms of this and the May order will be required and expected of both parties.

Entered July 24, 1981

/s/ Robert A. Grant
ROBERT A. GRANT
Senior District Judge

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

CIVIL ACTION NO. 79-198
CONSOLIDATED CASES

JUAN FUMERO SOTO, *Plaintiff*,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary in charge of Personnel of Public Education of the Commonwealth of Puerto Rico,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that Carlos Chardon and Oscar Ramos, defendants above named, hereby appeal to the United States Court of Appeals for the First Circuit from the Final Order and Judgment entered in this action on the twenty-ninth day of July, 1981.

Dated July 29, 1981.

/s/ John G. DeGooyer
JOHN G. DEGOOYER
HAMEL, PARK, MCCABE & SAUNDERS
1776 F Street, N.W.
Washington, D.C. 20006
(202) 785-1234
Attorney for Defendants

OF COUNSEL

HECTOR REICHARD DE CARDONA
SECRETARY OF JUSTICE
ROBERT ARMSTRONG, JR.
DEPUTY SOLICITOR GENERAL
INES EQUIA MIRANDA
ATTORNEY
DEPARTMENT OF JUSTICE
P.O. Box 192
San Juan, Puerto Rico 00902

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

CIVIL NO. 79-198

78-1156
79-66 79-85 79-194 79-215 79-330
79-67 79-164 79-197 79-218 79-332
79-70 79-167 79-199 79-219 79-333
79-72 79-169 79-200 79-220 79-334
79-73 79-170 79-203 79-221 79-335
79-74 79-176 79-206 79-224 79-336
79-76 79-179 79-209 79-227 79-357
79-79 79-182 79-210 79-323 79-358
79-82 79-183 79-212 79-325 79-361
79-83 79-185 79-213 79-326 79-362

JUAN FUMERO SOTO, *Plaintiff*,

v.

CARLOS CHARDON, *et al.*, *Defendants*.

JUDGMENT

The Court, through Honorable Robert A. Grant, has entered an Order on July 29, 1981, in furtherance of the Court's Order of May 12, 1981. The Court has ordered that defendants reinstate the following plaintiffs to the respective position each held, or its functional equivalent, at the time of their demotion and that defendants pay each plaintiff the amounts agreed upon as follows:

CASE NO.	NAME	AMOUNT
78-1156	Jose Ortiz Rivera	$6,000.00
79-67	Syraida Rosa Cardona	$8,400.00
79-70	Carmen L. Negron Marin	$1,800.00
79-72	Aida Rodriguez Rios	$2,450.00
79-73	Carmen H. Montes Velez	$1,818.75
79-74	Carmen Garcia Rosado	$4,545.56
79-76	Noelia Torres de Cantres	$8,332.76

CASE NO.	NAME	AMOUNT
79-82	Iraida Sanchez Marquez	$6,000.00
79-83	Antonio Rodriguez Rivera	$ 720.00
79-85	Edda I. De Ayala Lafuente	$ 196.48
79-167	Josefa Marrero Ayala	No back pay
79-169	Nilsa Cardona Flores	$3,600.00
79-170	Jose A. Alvarado	$3,120.00
79-176	Elba M. Colon Torres	$1,837.50
79-179	Carmen Ortiz Lemois	$7,200.00
79-182	Andres A. Hernandez Ortiz	$4,345.00
79-183	Aurora Sierra Pizarro	$ 375.00
79-185	Virginia Otero Arroyo	$4,350.00
79-194	Maria V. Pagan Seda	$1,300.00
79-197	Ana Mercedes Ortiz Colon	$7,175.00
79-198	Juan Fumero Soto	$1,920.00
79-199	Dora Castro de Aguilar	$3,600.00
79-200	Antonio Vega Ortiz	$ 300.00
79-203	Jose A. Surillo Rodriguez	$1,571.71
79-206	Reinaldo Rodriguez Solivan	$9,120.00
97-209	Sylvia M. Denis	$6,000.00
79-210	Vienvenido Castro Del Valle	$7,200.00
79-212	Kremlly Rodriguez Valentin	$2,450.00
79-213	Elba Rosario de Bravo	$ 520.00
79-215	Lydia Munoz Morales	$ 710.00
79-218	Angel Luis Marrero Gonzalez	$1,570.04
79-219	Ramon Norat Zayas	$2,050.00
79-220	Charles H. Quiles Mariani	No back pay
79-221	Carmen T. Lugo Sotero	$ 112.50
79-224	Iris Camelia Velez Morales	$5,340.00
79-227	Jorge O. Principe Galarza	$3,600.00
79-323	Santiago Gonzalez Velazquez	$1,084.96
79-325	Bienvenido Rivera Diaz	$1,200.00
79-330	Angela Colon Santiago	$2,400.00
79-332	Joaquin Cruz Mendez	$2,400.00
79-333	Ursula Aguilar Quintero	$8,400.00
79-334	Aminta Rivera Cardonna	No back pay
79-335	Roberto Cruz Cruz	$1,920.00
79-336	Nelson Velez Quinones	$2,450.00
79-357	Cristina Cancel Cuevas	$1,200.00
79-358	Maria D. Guerra Navarro	$2,400.00
79-361	Francisco Bonilla Ocasio	No back pay
79-362	Heriberto Gallardo Gutierrez	No back pay

Wherefore, IT IS ORDERED AND ADJUDGED that defendants reinstate the above named plaintiffs in accordance with the Court's Order of May 12, 1981, and that defendants pay each of the above named plaintiffs the above mentioned amounts as back pay.

In Cases No. 79-79, Efrain Tacoronte Ruiz; 79-326, Carmen M. Morales Hernandez; 79-66, Carmen Nunez Rivera; and 79-164, Jose E. Aponte de la Torre, the Court ordered that reinstatement relief be granted in accordance with the terms of the Order of May 12, 1981, and that back pay and damages claim be held in abeyance for further consultation.

Wherefore, IT IS FURTHER ORDERED AND ADJUDGED that reinstatement relief be granted by defendants to the above named plaintiffs in accordance with the terms of the Order of May 12, 1981.

Regarding Cases Nos. 79-329, Juan Rivera Pagan; 79-364, Julio E. Colon; and 78-188, Carmen D. Perez Roman, the Court finally ordered that all relief, monetary and reinstatement, be stayed pending further proceedings.

IT IS SO ORDERED.

San Juan, Puerto Rico, July 31, 1981.

RAMON A. ALFARO
Clerk of the Court

/s/ By: Sarita Tejedor
SARITA TEJEDOR
Supervisor Deputy Clerk

IN THE

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

CIVIL ACTION NO. 79-198 (Tr)
(CONSOLIDATED CASES)

JUAN FUMERO SOTO, *Plaintiff*,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary in charge of the Personnel of Public Education of the Commonwealth of Puerto Rico,

Defendants.

NOTICE OF CROSS APPEALS

Notice is hereby given that Juan Fumero Soto, et al,* Plaintiffs in the consolidated cases herein, hereby cross-appeal to the United States Court of Appeals for the First Circuit from the Judgment entered in this action on the 31st day of July, 1981, according to Judge Robert A. Grant's Final Order and Judgment of July 29, 1981, in furtherance of the Order of May 12, 1981, as regards the Court's conclusion that the relief granted exhausts the remedies and damages available to plaintiffs, that the jury's findings vitiate the need to hold compensatory and punitive damages trials and also regarding the Court's legal conclusion that defendants individually are

---

*See Attachment A, made a part of this Notice.

protected by the qualified immunity defense and are therefore not individually liable for compensatory and punitive damages.

Dated August 12, 1981.

/s/ Jesus R. Rabell Mendez
JESUS R. RABELL MENDEZ

CANCIO, NADAL & RIVERA
G.P.O. Box 4966
San Juan, Puerto Rico 00936
Tel. (809) 767-9625

Attorneys for Plaintiffs

OF COUNSEL:
PROF. SHELDON NAHMOD
77 South Wacker Drive
Chicago, Illinois 60606
Tel. (312) 567-5761

ATTACHMENT A

The plaintiffs cross-appealing herein are:

	CASE NO.	NAME
1)	78-1156	Jose Ortiz Rivera
2)	79-67	Syraida Rosa Cardona
3)	79-70	Carmen L. Negron Marin
4)	79-72	Aida Rodriguez Rios
5)	79-73	Carmen H. Montes Velez
6)	79-74	Carmen Garcia Rosado
7)	79-76	Noelia Torres de Cantres
8)	79-82	Iraida Sanchez Marquez
9)	79-83	Antonio Rodriguez Rivera
10)	79-85	Edda I. de Ayala Lafuente
11)	79-167	Josefa Marrero Ayala
12)	79-169	Nilsa Cardona Flores
13)	79-170	Jose A. Alvarado
14)	79-176	Elba M. Colon Torres
15)	79-179	Carmen Ortiz Lemois
16)	79-182	Andres A. Hernandez Ortiz
17)	79-183	Aurora Sierra Pizarro
18)	79-185	Virginia Otero Arroyo
19)	79-194	Maria V. Pagan Seda
20)	79-197	Ana Mercedes Ortiz Colon
21)	79-198	Juan Fumero Soto
22)	79-199	Dora Castro de Aguilar
23)	79-200	Antonio Vega Ortiz
24)	79-203	Jose A. Surillo Rodriguez
25)	79-206	Reinaldo Rodriguez Solivan
26)	79-209	Sylvia M. Denis
27)	79-210	Bienvenido Castro del Valle
28)	79-212	Kremly Rodriguez Valentin
29)	79-213	Elba Rosario de Bravo
30)	79-215	Lydia Munoz Morales
31)	79-218	Angel Luis Marrero Gonzalez
32)	79-219	Ramon Norat Zayas
33)	79-220	Charles H. Quiles Mariani

	CASE NO.	NAME
34)	79-221	Carmen T. Lugo Sotero
35)	79-224	Iris Camelia Velez Morales
36)	79-227	Jorge O. Principe Galarza
37)	79-323	Santiago Gonzalez Velazquez
38)	79-325	Bienvenido Rivera Diaz
39)	79-330	Angela Colon Santiago
40)	79-332	Joaquin Cruz Mendez
41)	79-333	Ursula Aguilar Quintero
42)	79-334	Aminta Rivera Cardona
43)	79-335	Roberto Cruz Cruz
44)	79-336	Nelson Velez Quinones
45)	79-357	Cristina Cancel Cuevas
46)	79-358	Maria D. Guerra Navarro
47)	79-361	Francisco Bonilla Ocasio
48)	79-362	Heriberto Gallardo Gutierrez
49)	79-79	Efrain Tacoronte Ruiz
50)	79-326	Carmen M. Morales Hernandez
51)	79-66	Carmen Nunez Rivera
52)	79-164	Jose E. Aponte de la Torre
53)	79-329	Juan Rivera Pagan
54)	79-364	Julio E. Colon
55)	78-188	Carmen D. Perez Roman

IN THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

CIVIL NO. 79-198
CONSOLIDATED CASES

JUAN FUMERO SOTO, *Plaintiff*,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary in charge of the Personnel of Public Education of the Commonwealth of Puerto Rico,

Defendants.

ORDER

Pursuant to this Court's Final Order and Judgment, entered in these consolidated cases on July 29, 1981, the parties have reached an agreement on certain outstanding back pay and reinstatement matters. Now, in accordance with the terms of that agreement, this Court does hereby, effective nunc pro tunc July 29, 1981, ORDER the defendants to pay the following plaintiffs the amounts agreed upon, as follows:

1- Jose E. Aponte de la Torre (Civil No. 79-164) — $27,476.00.

2- Juan Rivera Pagan (Civil No. 79-329) — $43,255.00

3- Julio E. Colon (Civil No. 79-364) — $45,310.00.

4- Carmen D. Perez Roman (Civil No. 79-188) — $42,195.00.

5- Carmen Nunez Rivera (Civil No. 79-66) — $3,600.00.

6- Efrain Tacoronte Ortiz (Civil No. 79-79) — $475.00.

7- Carmen M. Morales Hernandez (Civil No. 97-326) — $165.00.

It is further ORDERED that plaintiffs Juan Rivera Pagan (Civil No. 79-329), Julio E. Colon (Civil No. 79-364), and Carmen D. Perez Roman (Civil No. 79-188), be reinstated to the position each held, or its functional equivalent, at the time of their dismissals, according to the terms of the May 12, 1981 Order of this Court.

Defendants maintain that the back pay awards entered in these consolidated cases are in violation of the Eleventh Amendment, and by agreeing to the figures set out above, defendants do not waive any rights on appeal as to that position. Further, the parties do not, by consenting to the terms of this Order, waive any rights to any issues involved in the appeals of these consolidated cases, now pending before the United States Court of Appeals for the First Circuit.

Entered: 7 January 1982

/s/ Robert A. Grant
ROBERT A. GRANT
Senior District Judge

IN THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

Civil No. 79-198
Civil No. 79-164
Civil No. 79-329
Civil No. 79-188
Civil No. 79-66
Civil No. 79-79
Civil No. 79-326

JUAN FUMERO SOTO, *Plaintiff*,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico, and OSCAR RAMOS, individually and as Assistant Secretary in charge of the Personnel of Public Education of the Commonwealth of Puerto Rico,

Defendants.

JUDGMENT

The Court having entered an Order through the Hon. Robert A. Grant,

IT IS ORDERED AND ADJUDGED that defendants pay plaintiffs the following amounts:

1. Jose E. Aponte de la Torre (Civil No. 79-164) = $27,476.00.
2. Juan Rivera Pagan (Civil No. 79-329) = $43,255.00
3. Julio E. Colon (Civil No. 79-364) = $45,310.00.
4. Carmen D. Perez Roman (Civil No. 79-188) = $42,195.00.
5. Carmen Nunez Rivera (Civil No. 79-66) = $3,600.00.

6. Efrain Tacoronte Ortiz (Civil No. 79-79) = $475.00.
7. Carmen M. Morales Hernandez (Civil No. 79-326) = $165.00.

and

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs Juan Rivera Pagan (Civil No. 79-329), Julio E. Colon (civil No. 79-364), and Carmen Perez Roman (Civil No. 79-188) be reinstated to the position each held, or its functional equivalent, at the time of their dismissals, and

IT IS FURTHER ORDERED AND ADJUDGED that the judgment be entered nunc pro tunc as of July 29, 1981.

SO ORDERED.

San Juan, Puerto Rico, February 17, 1982.

/s/ Ramon A. Alfaro
RAMON A. ALFARO
Clerk of the Court

THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1237, *et al.*

RAFAEL RIVERA FERNANDEZ, *et al.*,
Plaintiffs-Appellants,

v.

CARLOS CHARDON, ETC., *et al.*,
Defendants-Appellees.

On Remand From The Supreme Court
Of The United States

Before
CAMPBELL, BOWNES, and BREYER,
Circuit Judges.

Nos. 81-1567
81-1607

JUAN FUMERO SOTO, *et al.*,
Plaintiffs-Appellees-Cross-Appellants,

v.

CARLOS CHARDON, ETC., *et al.*,
Defendants-Appellants-Cross-Appellees.

Appeals From The United States District Court
For The District Of Puerto Rico

[HON. ROBERT A. GRANT,* *U.S. District Judge*]

---

*Of the Northern District of Indiana, sitting by designation.

Before
COFFIN, *Chief Judge*,
GIBSON,** *Senior Circuit Judge*,
BOWNES, *Circuit Judge*.

Sheldon H. Nahmod, Hiram R. Cancio, Harry R. Nadal-Arcelay, Jaime R. Nadal-Arcelay, Jesus R. Rabell-Mendez, and *Cancio Nadal & Rivera* on brief for appellants.

K. Martin Worthy, John G. DeGooyer, Stephen L. Humphrey, Hamel, Park, McCabe & Saunders, Hector Reichard De Cardona, Secretary of Justice, and *Ines Eguia De Casanova,* Attorney, Department of Justice of Puerto Rico, on brief for appellees.

June 8, 1982

BOWNES, *Circuit Judge*. Before us in the instant action are two groups of consolidated cases that represent fifty-five and thirty-six cases, respectively. All ninety-one cases are actions based on 42 U.S.C. § 1983 charging illegal acts of political discrimination. The first group of consolidated cases, *Fumero Soto* v. *Chardon*, is an appeal from a jury verdict that defendants are liable to plaintiffs in the fifty-five cases and from the relief ordered by the court in its equitable power. The second group of consolidated cases, *Rivera Fernandez* v. *Chardon*, is on remand from the Supreme Court, which, in *Chardon* v. *Rivera Fernandez*, 50 U.S.L.W. 3341 (Nov. 2, 1981), reversed our decision on the statute of limitations issue in these cases, *Rivera Fernandez* v. *Chardon*, 648 F.2d 765 (1st Cir. 1981).[1] The *Rivera Fernandez* cases had been dismissed by the district

---

**Of The Eighth Circuit, sitting by designation.

[1] Our decision in *Rivera Fernandez* dealt with only twenty-three of the cases; we disposed of the other thirteen cases with separate but identical judgments. *Chardon* v. *Rivera Fernandez*, 50 U.S.L.W. 3341, 3341 n.1 (Nov. 2, 1981).

court and were not tried on the merits. We deal with these two sets of cases together because they both present questions concerning the tolling of the statute of limitations that are not foreclosed by the prior decisions in *Rivera Fernandez*. In addition, the defendants in *Fumero Soto* argue that the jury verdict was not supported by the evidence and that the damages award against the Puerto Rico Department of Education violated the eleventh amendment; plaintiffs in *Fumero Soto* contend that the individual defendants enjoy no immunity.

The Facts and Case Histories

All the *Fumero Soto* and *Rivera Fernandez* cases arose out of essentially the same facts. The plaintiffs in all cases held nontenured administrative positions in the Commonwealth of Puerto Rico Department of Education during the school year 1976-1977. The defendants are Carlos Chardon, then Secretary of Education for the Commonwealth, Oscar Ramos, then and now Assistant Secretary for Personnel in the same department, and Maria Socorro Lacot, now the Secretary of Education, who was substituted for Chardon in his official and individual capacities. Charon and Ramos were originally sued in their official and individual capacities. The events leading up to the instant actions began in January, 1977, when Carlos Romero Barcelo of the New Progressive Party (NPP) replaced Rafael Hernandez Colon of the Popular Democratic Party (PDP) as governor. Chardon and Ramos, members of the NPP, soon assumed positions in the Department of Education under the new regime. Chardon and Ramos, according to plaintiffs' complaints, then determined to remove nonpermanent administrative personnel who were active in the PDP or parties other than the NPP.

All the plaintiffs received letters—most of them in May and June 1977—from Julio Cintron Lopez, Director of the Teaching Personnel Division, informing them that they would not be reappointed to the administrative positions they currently held for the school year 1977-78 and that they would instead be required to return to the lower-paying, tenured teaching posi-

tions that they had held before. Three of the *Rivera Fernandez* plaintiffs had not previously held tenured teaching posts, so they were discharged. Most, if not all, of the plaintiffs sent letters of protest to Chardon, objecting to their demotion or termination and informing him that they were referring the matter to the Teachers Association of Puerto Rico for appropriate legal action.[2]

On June 19, 1978, one demoted employee, Jose Ortiz Rivera, filed a class action against Chardon and Ramos in their individual and official capacities on behalf of all persons discharged or demoted by Chardon and Ramos for political reasons, claiming a violation of first and fourteenth amendment rights protected by 42 U.S.C. § 1983[3] and P.R. Laws Ann. tit. 18, §§ 214, 249a, 249e.[4] Class certification was denied on August 21, 1978, be-

---

[2] The letters were all virtually identical, the texts of which read in substance as follows:

> Dear Mr. Secretary:
>
> I have received a letter from the Department you direct dated [date], signed by Mr. Julio Cintron Lopez, Director of the Teaching Personnel Division. I am not in agreement with your decision.
>
> To that effect, I have sent a copy of the letter to the Teachers Association of Puerto Rico, so that said organization would instruct its Legal Division to take the corresponding action.
>
> In the meanwhile, I will obey the order issued by you.
>
> Sincerely,

[3] 42 U.S.C. § 1983 provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[4] P.R. Laws Ann. tit. 18, § 214 provides as follows:

> Every public-school teacher in active service through an appointment made in accordance with the school law, the regulations of the Department of Education, and the regulations of the

cause the class was not so numerous that joinder was impracticable. Fed.R.Civ.P. 23(a)(1). Plaintiffs then filed complaints individually in January, 1979, the earliest filings occurring on January 10. The individual complaints repeated the claims of Ortiz Rivera's class suit.

Commonwealth Board for Vocational and Technical Education, who shall have practiced as such in a school of any category during the probation period hereinafter specified, shall be entitled to be contracted as a permanent teacher in the category in which he may be practicing his profession at the expiration of the said probation period, without any further proof of classification or professional ability than the holding of a regular license of the same category of the position held by the teacher and to have, in the opinion of the Department, performed satisfactory work. For the purposes of sections 214-218 of this title, no consideration shall be given to the time such teachers may have been practicing as temporary teachers. Such teachers shall be entitled to be contracted as permanent teachers in the municipality where they may be teaching at the expiration of the probation period. The time worked by teachers with regular certificates as substitutes and who have performed satisfactory work in positions of the same category shall be confirmed as probationary period. The equivalence of the two (2) years of probationary period shall comprise the work performed with a substitute or probationary contract during two (2) consecutive years. Such teachers shall be entitled to be contracted as probationary or permanent teachers in the municipality where they may be teaching when entitled to a regular position.

P.R. Laws Ann. tit. 18, § 249a provides as follows:

For the purposes of sections 249a-249e of this title, all public-school teachers of Puerto Rico shall be considered as officers or employees of the Commonwealth Government while they are in active service, irrespective of the form and manner in which they may render their services to the people of Puerto Rico. By public-school teachers shall be understood, for the purposes of sections 249a-249e of this title, all teaching personnel, which includes both the teachers in charge of the teaching and special services directly connected with the teaching work, and the officers or employees in technical tasks or in school supervision and administration; all the teaching personnel contracted by the Vocational Education Board of Puerto Rico and those teachers contracted as such by other departments or agencies of the Commonwealth of Puerto Rico.

The history of the *Rivera Fernandez* cases is as follows. The district court dismissed the cases on the ground that they were barred by Puerto Rico's one-year statute of limitations. *E.g.*, *Aviles Navarro* v. *Chardon*, 506 F. Supp. 229 (D.P.R. 1980). We reversed, holding that the letter notifications did not trigger the statute, but that the actual demotions and discharges did and that suit was filed within one year of these events. *Rivera Fernandez* v. *Chardon*, 648 F.2d 765 (1st Cir. 1981). The Supreme Court reversed, finding that *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), controlled and that the letter notifications started the statute running. *Chardon* v. *Rivera Fernandez*, 50 U.S.L.W. 3341 (Nov. 2, 1981).

Meanwhile, decision was reserved on the statute of limitations question in the remaining fifty-five cases *(Fumero Soto)*. These cases were consolidated for trial, and the trial was bifurcated into liability and damages phases. After a five-day trial of the liability issues, a six-person jury returned unanimous verdicts in favor of the plaintiffs. The jury was also asked to answer special interrogatories, whether Chardon or Ramos acted with malicious intent to deprive plaintiffs of their constitutional or other rights. The jury answered these questions in the negative. The district court then asserted its equitable power to declare a remedy and ordered the Department of Education to reinstate those plaintiffs still in its employ to the positions they had held before their demotions and to give them back pay reflecting the difference in salary between their former positions and the positions to which they were demoted. Plaintiffs who had left the Department were held not

---

P.R. Laws Ann. tit. 18, § 249e provides as follows:

> The school authorities and all other authorities are hereby enjoined from all discrimination or reprisal against a teacher by reason of his affiliation, creed and political actions; and it is further forbidden that the circumstances mentioned above be taken into consideration in deciding questions such as transfers, work assignment, salary raises, promotions, scholarships, leaves of absence, and any other matters relative to the teacher's professional work or status.

entitled to reinstatement and were to receive back pay only for the period from the time of demotion to the time they left. On the basis of the jury's findings of no malicious intent, the court refused to award damages against Chardon and Ramos in their individual capacities or to award punitive damages. Defendants appealed; on August 14, 1981, we stayed that portion of the order requiring back pay because of "significant questions" as to its validity.

The Issues

The general issue is whether claims by any or all of the *Rivera Fernandez* and *Fumero Soto* plaintiffs were barred by the statute of limitations.[5] Before discussing the separate arguments raised, it is useful to mark a few recognized principles. In the absence of a federal statute of limitations, the analogous state statute is applied to the federal cause of action, *E.g.*, *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975); *O'Sullivan* v. *Felix*, 233 U.S. 318, 322 (1914). In Puerto Rico, the limitations period applicable to a § 1983 claim alleging violation of first amendment rights is one year. P.R. Laws Ann. tit. 31, § 5298(2); *Graffals Gonzalez* v. *Garcia Santiago*, 550 F.2d 687, 688 (1st Cir. 1977) (per curiam). At least as a matter of *federal* law, the filing of a class action will toll the statute of limitations for named and unnamed members of the class, and the statute will resume running when class certification is denied. *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 561 (1974).

Under *American Pipe*, the one-year statute of limitations would have been tolled on June 19, 1978, when Ortiz Rivera

---

[5] We take it that statute of limitations defenses were preserved in all cases. Defendants state that they raised the affirmative defense in timely fashion, and there is no contrary evidence. Nor do we believe that the defense was subsequently waived in any case, although the record on which plaintiffs rely for this argument is lamentably unclear.

filed his class action. The tolling would have ended, and the remaining portion of the limitations period would have recommenced running on August 21, 1978, when the district court declined to certify the class. Over half the plaintiffs in both sets of cases had received notice of demotion more than one year before Ortiz Rivera filed suit, so their claims would already have been time-barred. The remaining plaintiffs would have had from one to one hundred and thirty-eight days to file individual complaints after August 21, 1978. The earliest individual complaints were not filed, however, until January 10, 1979, after expiration of the remaining one hundred and thirty-eight day period.

Plaintiffs mount three attacks on the statute of limitations: that *Ricks* should not be applied retroactively; that the letters of protest tolled the statute of limitations;[6] and that the denial of class action certification in Ortiz Rivera's suit did not merely reactivate the statute of limitations, the *American Pipe* rule, but instead caused it to run anew. It is important to determine at the outset the relationships between these three contentions. The critical dates must be kept in mind; May-June 1977, notification by letters; August 31, 1977, plaintiffs vacate their positions; June 19, 1978, class action filed; August 21, 1978, class action dismissed; and January 10, 1979, first individual complaint filed.

The first claim, nonretroactivity, is insufficient alone to save all but a few of the suits because it would merely move the accrual date from the dates demotion letters were received to the date plaintiffs had to leave their positions, August 31, 1977. The class suit was filed nine months, nineteen days after that, so that, under the *American Pipe* rule, when class certification was denied on August 21, 1978, only two months, eleven days would have remained for all plaintiffs to file complaints. The period thus would have expired on November 1, 1978, before which time no individual complaints had been filed.

---

[6] Plaintiffs also argue in the alternative that this issue should be certified to the Supreme Court of Puerto Rico.

The second position, that the letters of protest sent by plaintiffs were sufficient under Puerto Rican law to toll the statute of limitations so that it commenced running anew, is also inadequate alone in all but a few cases. This would save the otherwise time-barred claims of those who received notice of demotion prior to June 19, 1977, but who did not write a protest letter until after that date. The filing of the class action would then have been timely as to them. After certification was denied on August 21, 1978, they would have had whatever time had not expired from the one-year period in which to sue individually. The unexpired time would be insufficient in most cases, however, to carry over into January.

The third contention, that denial of class certification on August 21, 1978, starts the one-year statute running from scratch, by itself would save claims that were based on notices of termination received within a year prior to filing of the class action, June 19, 1978. This rule alone would not help any of the *Rivera Fernandez* plaintiffs, all of whom received discharge notifications before June 19, 1977. In combination with the nonretroactivity contention, this would save all *Rivera Fernandez* and *Fumero Soto* claims because they would not accrue until August 31, 1977. In combination with the letter tolling contention, the third argument would save those additional claims in which notice was received before June 19, 1977, but a letter of protest was sent after that date.

The Tolling Effect of the Class Action

The linchpin of plaintiffs' contentions, therefore, is that, under Puerto Rican law, a class action will cause the statute of limitations to begin running anew. Puerto Rican tolling rules, rather than the federal rule of *American Pipe* in which the running of the limitations period is merely suspended, apply, unless they are inconsistent with federal law. *Board of Regents* v. *Tomanio*, 446 U.S. 478, 483-86 (1980). Under P.R. Laws Ann. tit. 31, § 5303, the limitations period against an action ceases to run when the action is instituted in court; if the action is discontinued, the case law has held that the limitations

period begins to run anew from that time. *E.g.*, *Feliciano* v. *Puerto Rico Aqueduct & Sewer Auth.*, 93 P.R.R. 638, 644 (1966); *Heirs of Gorbea* v. *Portilla*, 46 P.R.R. 279 (1934); *De Jesus* v. *De Jesus*, 37 P.R.R. 143 (1927). *See also Hernandez del Valle* v. *Santa Aponte*, 440 F. Supp. 254 (D.P.R. 1977), *rev'd on other grounds*, 575 F.2d 321 (1st Cir. 1978); *Bedard* v. *Consolidated Mutual Insurance Co.*, 313 F. Supp. 1021, 1021-22 (D.P.R. 1970). This tolling is effective only with regard to identical causes of action; the filing of one action does not toll the statute of limitations for all claims arising out of the same facts. *Ramirez de Arellano* v. *Alvarez de Choudens*, 575 F.2d 315, 319-20 (1st Cir. 1978). The substantive claims asserted in Ortiz Rivera's class action complaint were identical to those alleged in subsequent individual complaints. The question here is whether a class action is different from an individual complaint—at least as to unnamed plaintiffs in the class action—for purposes of the identical claim rule. The Puerto Rico Supreme Court has not ruled on this question. The obvious analogy is to the federal rule of *American Pipe*, wherein the running of the statute of limitations was suspended as to both named and unnamed class members. Defendants argue, however, that *American Pipe* cannot be used here because plaintiffs have resisted that part of the *American Pipe* rule that provides for suspension and have instead insisted that the statute of limitations run anew.

To the extent that defendants make an estoppel argument, we reject it, but the substance of their argument bears further consideration. Application of state tolling rules to § 1983 claims is required by 42 U.S.C. § 1988, *Board of Regents* v. *Tomanio*, 446 U.S. at 484-85; *Robertson* v. *Wegmann*, 436 U.S. 584, 588 (1978), unless the state rules are inconsistent with the federal policy underlying § 1983. *Board of Regents* v. *Tomanio*, 446 U.S. at 485-86; *see Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 465 (1975) (same as to § 1981 claims). Thus in a § 1983 case, the federal rule and underlying reasoning of *American Pipe*, are not generally applicable. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. at 466-67. *But see Morton* v. *Charles County Bd. of Educ.*, 373 F. Supp. 394, 396 (D. Md.

1974), *aff'd on other grounds*, 520 F.2d 871 (4th Cir.), *cert. denied*, 423 U.S. 1034 (1975) (under *American Pipe*, § 1983 class action tolled limitations period for all class members). In the instant case, though, there is no discernible state rule. Moreover, Puerto Rico has modeled its class action procedure, P.R. Laws Ann. tit. 32, App. II, R. 20.1, on the federal class action procedure. *Caguas Lumber Yard, Inc.* v. *Superior Court*, 96 P.R.R. 826, 830 (1969). Because the decision in *American Pipe* that unnamed class members could take advantage of the tolling effect of a pending class action was based on an interpretation of the federal class action rule, Fed.R.Civ.P. 23(a), *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. at 550-52, we believe that this reasoning would also be applied in determining the relationship between class actions and tolling rules in Puerto Rico. We conclude that named and unnamed plaintiffs may benefit from the tolling effect of a class action, if class certification is later denied on grounds of lack of numerosity. *Cf. id.* at 552-53.

This conclusion answers only half of the question. The issue remains whether *American Pipe* or other reasons require that unnamed ciass members gain the benefit only of suspension of the running of the limitations period, notwithstanding the Puerto Rican rule that the statute starts to run anew under similar circumstances. In *American Pipe*, the pendency of the class action suspended the running of the limitations period because the statute providing the underlying cause of action, section 5(b) of the Clayton Act, provided for suspension where the government filed suit under the statute. *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. at 560-61. In this case, neither § 1983 nor any of the related Civil Rights Acts provisions suggest the precise effect that commencement of a class action or any other action should have. It is true that "in the American common law generally, prior judicial actions do not toll the statute of limitations, no matter how close their relationship to the one at bar." *Ramirez de Arellano* v. *Alvarez de Choudens*, 575 F.2d at 319 (citations omitted). Puerto Rico has not adopted the American common law, however, and we see no reason not to apply its running anew rule to unnamed plain-

tiffs. None of the parties has pressed on us an argument that the federal policies underlying § 1983 require a particular result here, *see Board of Regents* v. *Tomanio*, 446 U.S. at 485-86, and we can discern no particularly strong policies implicated. Two policies often associated with § 1983 and tolling rules are those or repose and federalism. *See Williams* v. *Walsh*, 558 F.2d 667, 674-75 (2d Cir. 1977). In this case, the class action—assuming that it itself was timely filed, a matter we discuss below—did not disturb any protected repose defendants enjoyed with respect to § 1983 claims, and commencement of a new limitations period after the pendency of the class action would not interrupt any further repose. In addition, defendants are Puerto Rican, and there is no unfair surprise in following Puerto Rican law. The policy of federalism also appears to be well served: Puerto Rican law is permitted its fullest effect without any visibly adverse impact on federal rights. We hold, therefore, that a class action asserting a § 1983 claim tolls the Puerto Rican statute of limitations during the pendency of the class action for all purported class members and that when class certification is denied for lack of numerosity, the limitations period begins to run anew.

The Retroactivity of *Delaware State College* v. *Ricks*

We now turn to the two remaining arguments on tolling, keeping in mind that the one-year statute of limitations was tolled by the filing of the class action on June 19, 1978, and started running anew when the class certification was denied on August 21, 1978. Success on the contention that the Supreme Court's decision in *Delaware State College* v. *Ricks*, 449 U.S. 250, should not be applied retroactively would save all suits, so we now examine that. Defendants in *Fumero Soto* argue that the decision in *Chardon* v. *Rivera Fernandez*, 50 U.S.L.W. 3341, controls this issue and requires retroactivity because the facts in that group of cases involved the same alleged incidents of political discrimination as the *Fumero Soto* cases do. Nothing is said in the *Rivera Fernandez* opinion

regarding retroactivity.[7] We do not think that the retroactivity question is therefore foreclosed.

The application of nonretroactivity depends on an evaluation of

> three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, *e.g.*, *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, [392 U.S. 481,] 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, *e.g.*, *Allen* v. *State Board of Elections*, [396 U.S. 544,] 572. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter* v. *Walker*, [381 U.S. 618,] 629. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano* v. *City of Houma*, [395 U.S. 701,] 706.

Chevron Oil Co. v. *Huson*, 404 U.S. 97, 106-07 (1971). *See Aufiero* v. *Clarke*, 639 F.2d 49, 51 (1st Cir.), *cert. denied*, 452 U.S. 917 (1981). In analyzing *Chevron Oil's* first factor, plaintiffs direct us to several cases purportedly standing for the proposition that a § 1983 cause of action accrues when plaintiff is actually demoted or terminated. The weight of authority is

---

[7] In further asserting the conclusive effect of *Rivera Fernandez*, defendants argue that the Supreme Court denied the *Rivera Fernandez* plaintiffs' petition for rehearing, which raised the nonretroactivity issue. Defendants' argument is utterly without merit because surely the denial of a petition for rehearing can have no greater precedential effect than the denial of a petition for certiorari, which is to say none. *See Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (opinion of Frankfurter, J., respecting denial of petition for writ of certiorari).

far less than plaintiffs suggest. One of the cases cited stands essentially for the *Ricks* rule of accrual rather than for plaintiffs' asserted rule, *NLRB* v. *California School of Professional psychology*, 583 F.2d 1099, 1101-02 (9th Cir. 1978) (applying § 10(b) of National Labor Relations Act); *accord*, *Nazareth Regional High School* v. *NLRB*, 549 F.2d 873, 882 (2d Cir. 1977), three cited cases stand equally well for the *Ricks* rule as for plaintiffs' rule, *Morelock* v. *NCR Corp.*, 586 F.2d 1096, 1103 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979) (Age Discrimination in Employment Act); *Payne* v. *Crane Co.*, 560 F.2d 198, 199 (5th Cir. 1977) (per curiam) (same Act); *Fitzgerald* v. *Seamans*, 553 F.2d 220, 226-31 (D.C. Cir. 1977) (42 U.S.C. § 1985(3)), two are at best suggestive of plaintiffs' proposition, as we observed in *Rivera Fernandez* v. *Chardon*, 648 F.2d at 768, *Bonham* v. *Dresser Industries, Inc.* 569 F.2d 187, 192 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978) (Age Discrimination in Employment Act); *Moses* v. *Falstaff Brewing Corp.*, 525 F.2d 92, 95 (8th Cir. 1975) (same Act), and only one offers square support for plaintiffs' rule, *Egelston* v. *State Univ. College at Geneseo*, 535 F.2d 752, 755 (2d Cir. 1976) (Title VII). Moreover, despite the Second Circuit's decision in *Egelston*, the Fourth Circuit reached a contrary conclusion in December, 1977, *Bireline* v. *Seagondollar*, 567 F.2d 260, 263 (4th Cir. 1977), *cert. denied*, 444 U.S. 842 (1979). It is true that, as of the summer of 1977, little law existed regarding the accrual date of a § 1983 cause of action, but the one established principle was that a civil rights cause of action accrued when plaintiff knew or had reason to know of his or her injury, *see*, *e.g.*, *Cox* v. *Stanton*, 529 F.2d 47, 50 (4th Cir. 1975); 1 C. Antieau, Federal Civil Rights Acts § 241, at 412 (2d ed. 1980), which could support either the *Ricks* rule or plaintiffs' rule.*

---

* This observation relates to the question whether in a retroactivity analysis, we should focus on the state of the law at the time the claim arose, *Wachovia Bank & Trust Co.* v. *National Student Marketing Corp.*, 650 F.2d 342, 347 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981), or on the state of the law when the new decision

We cannot say that *Ricks* established a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression. *Chevron Oil Co.* v. *Huson*, 404 U.S. at 106.

The second factor bearing on nonretroactivity involves examining " 'the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' " *Chevron Oil Co.* v. *Huson*, 404 U.S. at 107, quoting *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965). *Linkletter* restated the inquiry as one into the purpose of the new rule, reliance placed on the old rule, and the effect of retroactivity on the administration of justice, *Linkletter* v. *Walker*, 381 U.S. at 636. The inquiry has also been construed more simply as the last clause of the *Chevron Oil* factor: whether retroactive application will further or retard operation of the rule, *Wiltshire* v. *Standard Oil Co.*, 652 F.2d 837, 841 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3766 (Mar. 22, 1982). However stated, this test for the retroactivity of a rule of law requires an explanation of the purposes of the new rule and consideration of its impact on the prior law, which thereby make this test dependent on the first factor: the less (or the less clear) prior law, the less adverse impact there would be, and this would militate against retroactivity. The accrual rule of *Ricks* seems to promote more strongly the policy of repose that underlies the applicable state statute of limitations. The policy of repose is that a defendant can be expected to defend a suit only for a certain period after the act complained of. The period of susceptibility to suit should begin when the defendant is first aware (or should be aware) of facts that give rise to the concrete possibility of suit. A competing policy is that a limitations period should not begin to run against a plaintiff until he is or

---

comes out. We intimate no views on whether we agree with *Wachovia Bank*. That opinion would provide a stricter test for retroactivity here; we think that under *Wachovia* the "new" law was clear at the time plaintiffs' claims arose.

should be aware of the actionable conduct. Under *Ricks* these policies are reconciled as follows: the crux of a § 1983 action is a discriminatory act, and in an employment case, this act occurs—and the limitations period begins to run—when notice of termination or demotion is given, not when the firing or demotion actually takes effect. Retroactive application of *Ricks* would give greater protection to defendants' repose without unduly limiting plaintiffs' ability to sue. Moreover, given the at best unsettled state of the law on accrual before *Ricks*, retroactive application would not disrupt expectations of either party. There would also seem to be little impact on the administration of justice whether or not *Ricks* is applied retroactively. The second test of *Chevron Oil* thus does not require nonretroactivity.

We might still find retroactivity barred if it would produce substantially inequitable results, the third *Chevron Oil* factor. This factor reflects concern that a plaintiff not be accused of "sleeping on his rights" when he could not have known of restrictions on his rights, *Chevron Oil Co.* v. *Huson*, 404 U.S. at 108, and that injustice or hardship not be caused, *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969) (per curiam). The equities that the *Fumero Soto* plaintiffs rely on are their day in court to vindicate their right to freedom from political discrimination, the existing jury finding of liability on the part of the defendants, and the expenses already incurred at trial. Neither group of plaintiffs advance any reason, however, as to why they waited so long before filing suit, thereby risking a time bar if the date of notice of demotion were to become the accrual date. The then-existing law was not at all clear on this point. The right plaintiffs seek to enforce is not so important that limitations periods should be disregarded. The expenditure of time and energy in the *Fumero Soto* case is regrettable, but the limitations problem had been recognized before the case was tried on its merits. We are unpersuaded that equity requires *Ricks* to be applied prospectively only, and we hold that *Ricks* applies retroactively.

The Tolling Effect of the Letters of Protest

We now turn to the argument that letters sent by the plaintiffs in both cases to Chardon and the Department of Education protesting their demotions constituted "extrajudicial claim[s] of the creditor[s]" within the meaning of P.R. Laws Ann. tit. 31, § 5303, which thereby tolled the limitations period and caused it to run anew. We have held that such extrajudicial claims must be "precise and specific" in order to have this desired tolling effect. *Gual Morales* v. *Hernandez Vega*, 604 F.2d 730, 733 (1st Cir. 1979), citing, *Jiminez* v. *District Court*, 65 P.R.R. 35, 42 (1945). A proper extrajudicial claim must seek the same relief ultimately sought in the subseqent lawsuit. *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d 321, 323-24 (1st Cir. 1978). Plaintiffs believe that their protest letters satisfied these conditions. If they do not, however, they urge us to reconsider *Gual Morales* and *Hernandez del Valle* for the following three reasons: the Supreme Court's recent decision in *Board of Regents* v. *Tomanio*, 446 U.S. 478, requires modification of our decisions; Puerto Rican law treats "extrajudicial claim" more liberally than do our decisions; and *Hernandez del Valle* erroneously used federal law in construing "extrajudicial claim" restrictively. Alternatively, they request that we certify to the Puerto Rico Supreme Court the question of the tolling effect of the protest letters.

The *Rivera Fernandez* and *Fumero Soto* plaintiffs sent virtually identical letters of protest to Chardon in which each plaintiff acknowledged receipt of his demotion letter, stated his disagreement with the decision, informed Chardon that he had sent a copy of the demotion letter to the Puerto Rico Teachers Association to take appropriate action, and said he would obey the order.[8] These letters did not make a "precise and specific" claim for the relief ultimately sought. The plaintiffs later sought reinstatement, back pay, actual and punitive damages, costs and attorney's fees, and a permanent injunc-

---

[8] See footnote 2 for the verbatim text of the letters.

tion against defendants from any further acts of political discrimination. None of these claims were asserted in the letters; the letters allude only to necessary legal action. This warning does not serve the purpose of a "precise and specific" claim, alerting defendants to still-live claims that would otherwise lapse. These letters are in the nature of a mere reminder, not a claim, *see Diaz de Diana* v. *A.J.A.S. Ins. Co.*, ___ P.R.R. ___ (1980), and do not come within § 5303.[9]

We also decline the invitation to reconsider *Gual Morales* and *Hernandez del Valle*. The three reasons advanced for reconsideration tend to merge. The first reason, the *Tomanio* case, which held that state tolling law applies to the state statute-of-limitations questions that arise in a § 1983 case, is said to require reconsideration because our earlier decisions incorrectly interpreted Puerto Rican law—the second reason for reconsideration—and because those decisions improperly took federal law into account—the third reason. We cannot and do not, of course, dispute *Tomanio*, but we do not believe that *Gual Morales* and *Hernandez del Valle* violated its guidelines. Puerto Rican law does not, contrary to the plaintiffs' assertions, require a wider construction of "extrajudicial claim." Our decision in *Hernandez del Valle* relied on two Commonwealth Supreme Court cases and one federal district court case from Puerto Rico. *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d at 323-24. In addition, the Puerto Rico Supreme Court recently observed that, because the "extrajudicial claim" provision of § 5303 constituted an exception to the extinguishment of actions, it should be construed narrowly. *Diaz de Diana* v. *A.J.A.S. Ins. Co.*, ___ P.R.R. at ___ & n.1. The commentators cited by plaintiffs, Diez-Picazo, La Prescripcion En El Codigo Civil 93-95, 130-31; 12 Manresa, Codigo Civil 1242-43 (1973), do not appear to urge a different interpretation. Diez-

---

[9] We have no occasion to consider defendant Ramos's contention that, because the letters were sent to Chardon at the Department of Education, Ramos never received them so that they could not in any event constitute extrajudicial claims as to him.

Picazo does state (in translation) that no particular form is required for an extrajudicial claim but goes on to discuss summonses, letters, and oral claims, matters of form not at issue here. We do not think that we have construed Puerto Rican law improperly.

Nor has federal law been read erroneously into § 5303. Plaintiffs object in particular to a passage in *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d at 323, that states that expansion of "extrajudicial claim" beyond interpretations given by courts in Puerto Rico would undermine the policy of repose underlying statutes of limitation. Plaintiffs' argument is essentially that "policy of repose" is a common law concept that cannot be used in construing the civil code. The commentary concerning tolling that is cited by plaintiffs, Diez-Picazo, *supra*, and Manresa, *supra*, is certainly not inconsistent with the policy of repose, but in any case, it is clear that our decisions in *Hernandez del Valle* and *Gual Morales* rested primarily on a fair reading of Puerto Rican decisions. *Gual Morales* v. *Hernandez Vega*, 604 F.2d at 733; *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d at 223-24. Plaintiffs also refer us to *Miller* v. *Smith*, 625 F.2d 43 (5th Cir. 1980) (per curiam), and *Brown* v. *Bigger*, 622 F.2d 1025 (10th Cir. 1980) (per curiam), for support for their position here. *Miller* simply reversed and remanded for reconsideration in light of *Tomanio*, a decision with which we already conform; *Brown* v. *Bigger* is to similar effect and does not persuade us to alter our conclusion.

The plaintiffs ask us alternatively to certify to the Puerto Rico Supreme Court the question of the tolling effect of the protest letters. Certification is a matter within the discretion of the court. *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974). It is particularly appropriate where a novel and unsettled question of state law is involved, and where the judges on the federal bench are geographically distant from that state or are otherwise unfamiliar with its law. *See id.* at 391; *Gual Morales* v. *Hernandez Vega*, 604 F.2d at 732-33; *Ruiz Rodriguez* v. *Litton Industries Leasing Corp.*, 574 F.2d 44, 46 (1st Cir. 1978). Among other functions, certification is meant to save

"time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros.* v. *Schein*, 416 U.S. at 391.

The cases at bar do not involve a matter of first impression in Puerto Rican law, *cf. Hendrickson* v. *Sears*, 495 F.2d 513, 514 (1st Cir. 1974) (per curiam) (certification of "question of first impression in Massachusetts law"); *Bose Corp.* v. *Consumers Union, Inc.*, 384 F. Supp. 600, 603 (D. Mass. 1974) (same), nor an issue where the law is unsettled, *cf. Hiram Ricker & Sons* v. *Students Internat'l Meditation Soc'y*, 501 F.2d 550, 557-58 & n.16 (1st Cir. 1974) (certification where extension of prior Maine decisions was uncertain). The principle that an "extrajudicial claim" must be "precise and specific," *Jiminez* v. *District Court*, 65 P.R.R. at 42, that it must seek the same relief later sought in court, *Gual Morales* v. *Hernandez Vega*, 604 F.2d at 732-33; *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d at 323-24, has already been clearly laid down. We decline, therefore, to certify the issue to the Puerto Rico Supreme Court. *See Daigle* v. *Hall*, 564 F.2d 884, 886 (1st Cir. 1977) ("not particularly difficult" issue of state law does not require certification); *Oppenheimer Mendez* v. *Acevedo*, 512 F.2d 1373, 1375 (1st Cir. 1975) (where Puerto Rico law is clear, certification would be "hollow formality"). In every case, certification would help "build a cooperative judicial federalism," *Lehman Bros.* v. *Schein*, 416 U.S. at 391, by deferring to state courts, but the waste of time and energy in certifying the issue of "extrajudicial claim" here would be too great, *see id.*

Our ruling that the Ortiz Rivera class action tolled the statute of limitations during its pendency and caused it to run anew means that those *Fumero Soto* plaintiffs who received notice of termination within one year before the class action was filed, that is, after June 19, 1977, are not time-barred. The date of notice of termination is the triggering date under *Ricks* and *Rivera Fernandez*, not the protest letters. The *Fumero Soto* plaintiffs who received notice of termination before June 19, 1977, are time-barred. All the *Rivera Fernandez* plaintiffs received notice prior to June 19, 1977, and all those cases are time-barred.

The Verdict and the Subsequent Order of the District Court

There are four issues pertaining to the *Fumero Soto* plaintiffs who are not time-barred: whether the district court should have granted defendants' motion for judgment notwithstanding the verdict, Fed.R.Civ.P. 50(b); whether the general verdict should have been set aside because the answers to the special interrogatories were inconsistent with it, Fed.R.Civ.P. 49(b); whether the court erred in ordering the Commonwealth to make payments of back pay to plaintiffs; and whether the court erred in holding that the individual defendants should not pay damages.

To determine the sufficiency of the evidence, it is necessary first to set out the law concerning § 1983 liability. Liability may be grounded on negligence alone. *Parratt* v. *Taylor*, 451 U.S. 527, 532-35 (1981).

> Accordingly, in any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

Id. at 535. The first element raises several issues, among them whether there is a sufficient causal connection between defendant's acts and the alleged injury. There is also a related, though strictly extraneous issue, whether defendant enjoys immunity from damages, which we discuss below concerning the remedy in the instant cases. With respect to causality, there usually must be an affirmative link between acts of misconduct and plans or policies promulgaged by the defendant, *Rizzo* v. *Goode*, 423 U.S. 362, 371 (1976); defendant must commit the constitutional tort himself or "cause" another to commit the tort, *Monell* v. *Department of Social Servs.*, 436 U.S. 658, 692 (1978). Defendant will be liable for failures to meet his statutory responsibilities that amount to constitutional violations, *DiMarzo* v. *Cahill*, 575 F.2d 15, 17-18 (1st Cir.), *cert. denied*, 439 U.S. 927 (1978), and actual knowl-

edge of the resulting violations is unnecessary. *Id.* at 18 & n.3; *Tatum* v. *Houser*, 642 F.2d 253, 254 (8th Cir. 1981) (per curiam). Plaintiff may prove that defendant was derelict in supervising a subordinate whose acts caused constitutional injury. Such supervisory liability is ill-defined. *See Naughton* v. *Bevilacqua*, 605 F.2d 586, 589 (1st Cir. 1979). A superior will not be liable for undirected, sporadic acts of subordinates, *Layne* v. *Vinzant*, 657 F.2d 468, 471 & n.3 (1st Cir. 1981), but he will be liable where violations are so pervasive that a dutiful supervisor would have notice of them, *Naughton* v. *Bevilacqua*, 605 F.2d at 589. Mere failure to supervise is not a basis for liability under § 1983, *Owens* v. *Haas*, 601 F.2d 1242, 1246 (2d Cir. 1979), citing *Rizzo* v. *Goode*, 423 U.S. 362, but if delinquent supervision is so severe as to amount to gross negligence or deliberate indifference to constitutional violations, then liability will result, *Owens* v. *Haas*, 601 F.2d at 1246. "Section 1983 will not support a claim based on a *respondeat superior* theory of liability. *Monell* v. *Department of Social Services*, 436 U.S. 658, 694 (1978)." *Polk County* v. *Dodson*, 50 U.S.L.W. 4077, 4080 (Dec. 14, 1981).

The evidence, viewed in the light most favorable to the plaintiffs, showed the following. In early May, 1977, a memorandum was sent out over the signature of Virginia Belaval, an assistant to Chardon, to undersecretaries, deputy secretaries, and regional directors in the Department, informing them that nonpermanent positions in the Department would be filled by competition for the 1977-78 school year and that recommendations for retaining current non permanent employees should be sent with "appropriate justifications." Ramos and others actually prepared the memorandum, basing it on similar memoranda sent out at this time in earlier years. Chardon saw the memorandum and discussed it with Belaval. Some recommendations were received. At the end of May, Ramos ordered Julio Cintron Lopez to sign letters of demotion that were going to "clean out" members of the PDP in temporary positions. Cintron Lopez resisted but eventually complied; thereafter he was excluded from activities in the Department. At some

point, probably in the summer, Chardon saw some of the letters. The letters had the desired cleaning-out effect: the demoted plaintiffs were members of the PDP or unaffiliated with the NPP; they were replaced by NPP members. In particular, one regional director told Jose Surillo Rodriguez that he was being demoted because the NPP wanted to place its own member in his position but that Surillo Rodriguez could seek reappointment if he were willing to cooperate with the NPP. When the demoted teachers returned protest letters, Belaval heard their complaints, conducted brief investigations, and discussed some cases with Chardon. Chardon instructed Belaval, however, that unless she could persuade the regional directors to change their recommendations, their decisions would stand. At some time during his tenure as Secretary, Chardon spoke to a group of deputy superintendents and school principals. He was asked about the changes and demotions that had occurred in the Department, and he remarked that the PDP had left a great many "vacuums" or vacancies and that the NPP would take care that PDP members would not fill them. Chardon testified that he was referring only to 300 school director positions that were truly vacant at the time.[10]

This evidence is less than overwhelming, but we believe that it was sufficient to enable the jury to conclude that Chardon and Ramos had the necessary causal connection—or, as Chardon and Ramos put it, "personal involvement"—with the demotions to render themselves liable. Chardon is the more difficult case. He testified about his inability to control employees of the Department, and there was evidence about the Department's "decentralization policy:" accepting the decisions of local (and otherwise inferior) officials as final. The critical evidence was Chardon's statement that the NPP would

---

[10] Plaintiffs argue incorrectly that evidence available to the jury included defense counsel's "concession" that certain testimony "tied Chardon . . . into the personal involvement pattern." Statements of counsel are not evidence; plaintiffs' more egregious error is that the jury was not in the courtroom at the time the statement was made.

keep the PDP out of Department positions; the jury was entitled to credit Rivera Fernandez's testimony over Chardon's about the statement. From this, the jury could have concluded that Chardon avoided making changes in or interfering with Department activities that, under the prevailing policies, he knew would operate to demote employees on the basis of their political affiliation. *See Rizzo* v. *Goode*, 423 U.S. at 371 (need for affirmative link between misconduct and policies implemented by defendants). This is not a case of "the mere right to control without any control or direction having been exercised and without any failure to supervise." *Monell* v. *Department of Social Servs.*, 436 U.S. at 694 n.58.

The case against Ramos is stronger: he took charge of dispatching the demotion letters that he knew would "clean out" PDP members. The jury could have characterized his conduct as an act that directly caused constitutional injury to the plaintiffs.

We affirm the district court's denial of defendants' motion for judgment notwithstanding the verdict.

The next issue, the alleged inconsistency between the answers to the special interrogatories and the general verdict, requires an examination of the court's instructions to the jury. We have no difficulty with the instructions, to which no objections were made. It is necessary, however, to restate certain sections of the charge in order to understand the inconsistency claim and our ruling on damages.

The district court instructed the jury that one of the essential facts plaintiffs had to prove was

> that the defendant demoted him from the position that he held during the '76-'77 school year because of his political affiliation and of his activity in the affairs of the Popular Democratic Party or the—a political party other than the NPP.
>
> In other words, that plaintiff's political affiliation or activity in the affairs of his party was a substantial and/or

> motivating factor in the defendant's decision to demote him back to his permanent status[.]

On the question of immunity, the court instructed:

> The Commonwealth officials who are defendants in this case are not immune from liability for actions taken under Section 1983 if that official knew or should have known that the action taken within his sphere of official responsibility would violate the Constitutional or legal rights of the teachers affected, *or* if the official took the action with the malicious intention of causing a deprivation of Constitutional or legal rights or other injury to the teachers. (emphasis added).

After the case was submitted to the jury, there was a lengthy discussion between the court and counsel as to how damages would be handled if the jury found liability. The court was concerned because "we have got 55 cases, and it is beyond physical endurance for that same jury to come back and try 55 damage trials." During the discussion, the court opined "that there must be a finding of malicious intention to justify punitive damages." Counsel ultimately agreed, with the court's approval, that in the event the jury found defendants liable "that a new or second jury can be summoned to try the respective damages claims." The record does not disclose any discussion of special interrogatories.

After the general verdict was received, the court told the jury that it wanted it to determine "whether or not these acts were done with a malicious intent." It then defined malicious intent:

> Malice is the intentional doing of a wrongful act without just cause or excuse with an intent to inflict an injury or under circumstances that the law will imply an evil intent.
>
> Maliciousness does not necessarily mean actual malice or ill-will, but intentional doing of a wrongful act without legal or social justification.

The jury was then told to answer the following questions as to each defendant. "Did the defendant have a malicious intent to deprive defendants of their constitutional or other rights?"

There was no objection. The jury answered in the negative as to both defendants and was then discharged. Immediately after the jury left, counsel for the defendants moved for judgment notwithstanding the verdict "pursuant to Federal Rule 52(b)" on the ground that the special findings contradicted the general verdict.

It is Federal Rule of Civil Procedure 49(b) that covers the problem of inconsistencies between special interrogatories and the general verdict. Federal Rule of Civil Procedure 52(b) applies only where findings are made by the court in the first instance. The use of special interrogatories should have put counsel on notice that the provisions of Federal Rule of Civil Procedure 49 applied. Under Rule 49(b),[11] objections to the inconsistency of verdicts must be made before the jury is discharged or by motion to resubmit to the jury. *Skillen* v. *Kimball*, 643 F.2d 19, 19-20 (1st Cir. 1981); *see Stancill* v. *McKenzie Tank Lines, Inc.*, 497 F.2d 529, 534-35 (5th Cir. 1974); *Ludwig* v. *Marion Laboratories, Inc.*, 465 F.2d 114, 118 (8th Cir. 1972); *Barnes* v. *Brown*, 430 F.2d 578, 580 (7th Cir. 1970). The purpose of the rule is plain: to promote the efficiency of trials by allowing the original deliberating body to reconcile inconsistencies without the need for a new presentation of evidence to a different body. *Skillen* v. *Kimball*, 643 F.2d at 20. In the case at bar, counsel waited until after the jury was excused before raising the inconsistency claim. Defendants have, therefore, waived their right to have the general verdict set aside on this ground.

---

[11] Fed.R.Civ.P. 49(b) provides in pertinent part as follows:

> *General Verdict Accompanied by Answer to Interrogatories.*
>
> . . . When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial.

Even had defendants not waived their inconsistency claim, we would agree with the district court that the general verdict and the answers to the special interrogatories were not inconsistent. It is clear from reading the record that the district court submitted these questions to determine if punitive damages should be awarded. As the district court pointed out in its lengthy post-trial memorandum, the jury could have based its general verdict of liability on the ground that the defendants knew or should have known that their actions would violate the constitutional or legal rights of the teachers *or* that they acted with malicious intent. Immunity Instruction, *supra*, at 25. We agree with the district court that the only effect of the answers to the special interrogatories was to rule out punitive damages.

We now come to the post-trial order of the district court. In rejecting defendants' motion for judgment notwithstanding the verdict, the court issued two orders. It directed the Department of Education of the Commonwealth to reinstate all plaintiffs to the positions held at the time of their demotions. This order has been neither briefed nor argued on appeal. The court also ordered the Department of Education to pay all plaintiffs full back pay. The court then ruled that "as a matter of law and in light of the jury's factual finding that the defendants did not have a malicious intent to deprive plaintiffs of their rights, the relief herein granted exhausts the remedies and damages available to plaintiffs." Although we can understand the court's desire to dispatch the case in one fell swoop, we think the ruling was erroneous.

We turn first to the back pay award: whether the Commonwealth could be liable for it.[12] We are guided in answering the

---

[12] The district court denied defendants' motion to amend the judgment by vacating or rescinding the back pay award on the ground that the motion was untimely. We are not, however, foreclosed from considering defendants attack on the judgment. *See Evans* v. *Suntreat Growers & Shippers, Inc.*, 531 F.2d 568, 570 (Temp. Emer. Ct. App. 1976).

first question by P.R. Laws Ann. tit. 32, § 3085, which provides as follows:

> Every official, ex-official, employee or ex-employee of the Commonwealth of Puerto Rico who is sued for damages in his personal capacity, when the cause of action is based on alleged violations of the plaintiff's civil rights, due to acts or omissions committed in good faith, in the course of his employment and within the scope of his functions, may request the Commonwealth of Puerto Rico to provide him with legal representation, and to subsequently assume the payment of any judgment that may be entered against his person. Executive Directors, ex-Executive Directors, members and ex-members of the Governing Boards of public corporations and Government instrumentalities, mayors and ex-mayors shall be covered by these provisions, except that for the payment of judgments, they shall be governed by the provisions of section 3092 of this title. Any action brought under the provisions of sections 3077-3084 of this title shall not be covered by the provisions of this section.
>
> Likewise, these provisions shall not be construed, for any reason whatsoever, as making the Commonwealth an insurer of the aforesaid public services, nor as a waiver of the sovereign immunity of the Commonwealth.

Puerto Rico not having waived its sovereign immunity, the award against its Department of Education cannot stand.[13] In a § 1983 action, "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury." *Edelman* v. *Jordan*, 415 U.S. 651, 677 (1974). *See Quern* v. *Jordan*, 440 U.S. 332, 341 (1979); *Fitzgerald* v. *Bitzer*, 427 U.S. 445, 452 (1976). The district court concluded that the back pay award in the *Fumero Soto* cases was nevertheless permissible because it was "ancillary" to the

---

[13] The Commonwealth enjoys the full benefits of the eleventh amendment. *Ezratty* v. *Commonwealth of Puerto Rico*, 648 F.2d 770, 776 n.7 (1st Cir. 1981).

prospective relief of reinstatement. We cannot agree. The back pay and reinstatement remedies are entirely distinct; indeed, plaintiffs no longer with the Department of Education and not reinstated were held entitled to back pay. It is plainly retroactive relief requiring the payment of funds from the state treasury. Moreover, "ancillary" monetary relief that is appropriate against a state, *Quern* v. *Jordan*, 440 U.S. at 337, is far different from the relationship between back pay awards and other equitable relief that justifies a grant of back pay against bodies that do not enjoy sovereign immunity, *see Gurmankin* v. *Costanzo*, 626 F.2d 1115, 1121-22 (3d Cir. 1980), *cert. denied*, 450 U.S. 923 (1981) (approving back pay award as part of remedy in § 1983 and Title VII case) and cases cited therein. It was on this second, looser relationship that the district court erroneously relied.

Plaintiffs argue that the eleventh amendment proscription does not apply where a state may use federal funds to pay damages. The cases cited are instances where the state could seek reimbursement from the federal government, *Harrington* v. *Blum*, 483 F. Supp. 1015, 1021-22 (S.D.N.Y. 1979), *aff'd*, 639 F.2d 768 (2d Cir. 1980), where a back pay award is at issue and the state job position was federally funded, *Witter* v. *Pennsylvania Nat'l Guard*, 462 F. Supp. 299, 306 n.9 (E.D. Pa. 1978), or where state funds are held in a separate account for an historical society and an award limited to those funds will not affect the state's budgetary decisions, *Morrow* v. *Sudler*, 502 F. Supp. 1200, 1203-04 (D. Colo. 1980). These decisions are arguably sound: where the state will be unaffected by an award, its consent to suit and waiver of sovereign immunity seem unncessary. These decisions, however, do not reach the instant cases where plaintiffs show that at most state and federal funds are intermingled. *Cf. Florida Dep't of Health & Rehabilitation Servs.* v. *Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (per curiam) (state participation in federally funded public aid program does not amount to waiver of sovereign immunity). The Commonwealth here cannot avoid using state funds to pay the award, and its budget will be

affected. We, therefore, hold the back pay award against the Department of Education barred by the eleventh amendment.

The final issue is the court's ruling that because of the jury finding of lack of malicious intent, plaintiffs were not entitled to any damages from Chardon and Ramos. Unlike most civil rights damage cases, the individual defendants here never asserted a good faith defense. Their defense was that the demotions were for nonpolitical reasons. The district court pointed this out in its post-trial memorandum, and our review of the record confirms its finding. There is, therefore, no question of immunity, absolute or qualified, to be considered. We think the district court's ruling that lack of malice precluded compensatory damages was incorrect. The instructions to the jury, already quoted, and its general verdict rendered the defendants liable for compensatory damages. In *Wood* v. *Strickland*, 420 U.S. 308 (1975), the seminal § 1983 civil rights case on damages against individual defendants, the Court held:

> [T]he appropriate [immunity] standard necessarily contains element of both ["objective" and "subjective" good faith]. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students daily lives than by the presence of actual malice.

Id. at 321.

Here, the defense was neither good faith nor ignorance; defendants simply claimed that they did not violate the law. The jury found otherwise. Compensatory damages follow as a matter of course. Denial of punitive damages because of lack of malicious intent is no bar to liability for compensatory damages on the part of defendants who cannot survive the "ignorance or disregard" prong of the *Wood* test. *Cf. Morris* v. *Travisono*, 528 F.2d 856, 857 (1st Cir. 1976) (noting unappealed award of compensatory damages against three defendants but punitive damages against only two); *Smith* v. *Losee*, 485 F.2d 334, 344 (10th Cir. 1973) (in banc), *cert. denied*, 417 U.S. 908 (1974) (defendant indirectly responsible for political discrimination

by other defendants against plaintiff is liable for actual damages but not for punitive damages); *Stolberg* v. *Members of Bd. of Trustees for State Colleges*, 474 F.2d 485, 489 (2d Cir. 1973) (actual but not punitive damages awarded in political discrimination case); *Aumillier* v. *University of Delaware*, 434 F. Supp. 1273, 1311-12 (D. Del. 1977) (against defendant official who cannot invoke qualified immunity plaintiff must still prove malice or wanton disregard of constitutional rights in order to recover punitive damages).

The *Fumero Soto* cases not time-barred must be remanded for a jury trial on compensatory damages.

Summary

In Nos. 80-1237, *et al.*, *Rafael Rivera Fernandez et al.* v. *Chardon, et al.*, the judgments are vacated and all the cases are remanded to the district court with instructions to dismiss.*

In Nos. 81-1567 and 81-1607, *Juan Fumero Soto, et al.* v. *Chardon, et al.*, the liability judgment in favor of those plaintiffs who received letters of notice of demotion after June 19, 1977, is affirmed and the matter is remanded for assessment of compensatory damages against the individual defendants, Chardon and Ramos. This is a jury determination unless the parties agree otherwise. The judgment in the cases in which the plaintiffs received letters of demotion prior to June 19, 1977, is reversed and the matter is remanded with instructions to dismiss.

No costs to any party.

Judgments accordingly.

---

* Judges Campbell and Breyer, not having participated in 81-1567 and 81-1607, join in only so much of the opinion as relates to 80-1237.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1567.

JUAN FUMERO SOTO,
Plaintiff, Appellee,

v.

CARLOS CHARDON, ETC., *et al.*,
Defendants, Appellants.

No. 81-1607.

JUAN FUMERO SOTO, *et al.*,
Plaintiffs, Appellants,

v.

CARLOS CHARDON, ETC., *et al.*,
Defendants, Appellees.

JUDGMENT

Entered: June 8, 1982

These causes came on to be heard on appeals from the United States District Court for the District of Puerto Rico, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged, and decreed as follows: The liability judgment in favor of those plaintiffs who received letters of notice of demotion after June 19, 1977, is affirmed and the matter is remanded for assessment of compensatory damages against the individual defendants, Chardon and Ramos. This is a jury determination unless the parties agree otherwise. The judgment in the cases in which the plaintiffs received letters of demotion prior to

June 19, 1977, is reversed and the matter is remanded with instructions to dismiss.

No costs to any party.

By the Court:

Clerk.

[cc: Messrs. Nadal Arcelay, Nahmod, Cordova, Mss. Worthy and Eguia Miranda]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 81-1567
81-1607

JUAN FUMERO SOTO, *et al.*,
Plaintiffs-Appellees-Cross-Appellants,

v.

CARLOS CHARDON, ETC., *et al.*,
Defendants-Appellants-Cross-Appellees.

By Coffin, *Chief Judge,*
Gibson,* *Senior Circuit Judge,*
Bownes, *Circuit Judge.*

ORDER OF COURT

Entered: July 6, 1982

The petition for modification of judgment by plaintiffs-appellees and cross-appellants is granted. Those plaintiffs who received their letters of demotion on June 17, 1977, or thereafter are not time-barred. The last two lines on page 31 of the slip opinion and the first two lines on page 32 should be changed to read as follows:

> In Nos. 81-1567 and 81-1607, *Juan Fumero Soto, et al.* v. *Chardon, et al.*, the liability judgment in favor of those plaintiffs who received letters of notice of demotion on June 17, 1977, or thereafter is affirmed, etc.

By the Court:

DANA H. GALLUP,
Clerk.

/s/ By: FRANCIS P. SCIGLIANO
Francis P. Scigliano
Chief Deputy Clerk.

*Of the Eighth Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 81-1567
81-1607

JUAN FUMERO SOTO, *et al.*,
Plaintiffs-Appellees-Cross-Appellants,

v.

CARLOS CHARDON, ETC., *et al.*,
Defendants-Appellants-Cross-Appellees.

By Coffin, *Chief Judge*,
Gibson,* *Senior Circuit Judge*,
Bownes, *Circuit Judge*.

ORDER OF COURT

Entered: July 6, 1982

The petition for rehearing by defendants-appellants and cross-appellees is denied for the following reasons. The district court found in ruling on defendants' motion for summary judgment as to Ortiz Rivera:

> The present type of cause of action accrues on the date Plaintiff is officially informed that he is being demoted and he is aware of the reasons for this demotion. It is at this point that there is present a "complete and present cause of action." *Rawlings* v. *Ray*, 314 U.S. 96, 98 (1948). In the present case this occurred on June 21, 1977. Therefore, a complaint filed on June 19, 1978 would be timely.

Joint Appendix at 73.

In arriving at this conclusion, the court considered plaintiff's sworn statement to the effect that he was orally informed on May 27, 1977, that he was going to be removed from his

position as school director and assigned to his permanent position of teacher. The court specifically found:

> First from the informal and unofficial information Plaintiff received in May, 1977 one could not conclude that Plaintiff lost all reasonable expectations that he would continue at his position. Second, and along the same lines from the informal conversation one cannot conclude that Plaintiff was in fact demoted or reassigned. Until he was informed officially Plaintiff had no reason to believe that he was demoted.

Id. at 72.

We do not think the district court erred in making this finding. In the case cited by defendants, *McWilliams* v. *Escambia County School Board*, 658 F.2d 326 (5th Cir. 1981), the district court found that the plaintiff reasonably knew prior to the critical date that his position was being changed. The court of appeals found that "the record contains ample evidence to support the district court's ruling." *Id.* at 328. This is the obverse of the fact situation in *McWilliams* but the same rationale applies.

We rule that, as with all the other plaintiffs, the statute of limitations started to run as to Ortiz Rivera on the day he received the official letter of demotion, which was on June 21, 1977. The class action was, therefore, timely filed.

The second argument in the petition, that *American Pipe* should control, was discussed thoroughly in defendants-appellants' brief and in our opinion. No new reasons have been advanced that persuade us we should change the opinion in this regard.

By the Court:

DANA H. GALLUP,
Clerk.

/s/ By: FRANCIS P. SCIGLIANO
FRANCIS P. SCIGLIANO
Chief Deputy Clerk.

*Of the Eighth Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 81-1567
81-1607

JUAN FUMERO SOTO, *et al.*,
Plaintiffs-Appellees-Cross-Appellants,

v.

CARLOS CHARDON, ETC., *et al.*,
Defendants-Appellants-Cross-Appellees.

Before COFFIN, *Chief Judge,*
GIBSON,* *Senior Circuit Judge,*
and BOWNES, *Circuit Judge.*

ORDER OF COURT

Entered July 28, 1982

The motion of Chardon and Ramos, defendants-appellants, for stay of mandate pending application to the Supreme Court for a writ of certiorari is granted upon the condition that said application is filed by August 16, 1982, and the Clerk of this Court is given notice thereof.

The petition for rehearing on modification of judgment is denied. The date of filing is controlled by the Federal Rules and Federal Rules of Civil Procedure 6 expressly excludes from computation "a Saturday, a Sunday or a legal holiday" and Federal Rules of Appellate Procedure 26 contains the same exclusion.

By the Court:

/s/ DANA H. GALLUP
Dana H. Gallup
Clerk.

*Of the Eighth Circuit, sitting by designation.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

November 8, 1982

K. Martin Worthy, Esq.
Hamel, Park, McCabe & Saunders
888 - 16th Street, N.W.
Washington, D.C. 20006

RE: *Carlos Chardon, et al.* v. *Juan Fumero Soto, et al.*, No. 82-271

Dear Mr. Worthy:

The Court today entered the following order in the above case:

"The petition for a writ of certiorari is granted limited to Questions 1 and 2 presented by the petition."

Enclosed are memorandums describing the time requirements and procedures under the rules. Please read them carefully.

I have been instructed to inform you that Rule 34(a) is satisfied by having the initial sheet in the brief state the "Questions Presented" without more. Counsel should not have printed on this page the title of the case or any other descriptive matter. A sample sheet is enclosed.

The additional docketing fee of $100, Rule 45(a), is due and payable.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

/s/ By JUNE M. HOFFMANN
(Miss) JUNE M. HOFFMANN
Assistant Clerk

Enclosures